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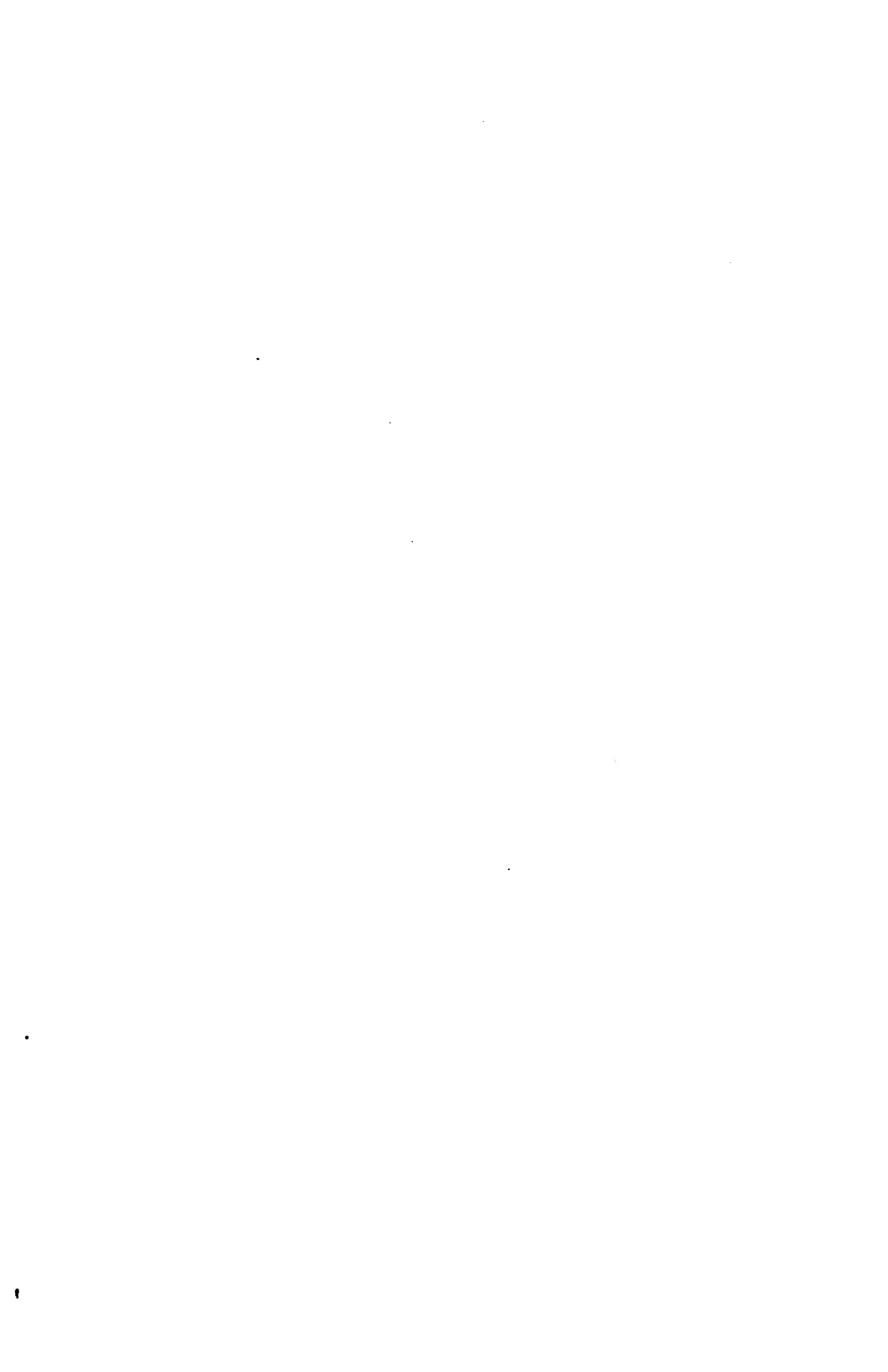
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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1885—1886.

VOLUME XVIII.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

LINCOLN, NEB.:

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1886.

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June 14

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By GUY A. BROWN, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

Rec. May 12, 1886

THE SUPREME COURT

OF

NEBRASKA.

1886.

CHIEF JUSTICE,

SAMUEL MAXWELL,

JUDGES,

M. B. REESE.

AMASA COBB.

ATTORNEY GENERAL,

WILLIAM LEESE.

CLERK AND REPORTER,

GUY A. BROWN.

DEPUTY,

HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA.

JUDGES.

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S. B. POUND,	SECOND DISTRICT.
J. L. MITCHELL,	SECOND DISTRICT.
JAMES NEVILLE,	THIRD DISTRICT.
E. WAKELEY,	THIRD DISTRICT.
A. M. POST,	FOURTH DISTRICT.
W. H. MORRIS,	FIFTH DISTRICT.
T. L. NORVAL,	SIXTH DISTRICT.
J. C. CRAWFORD,	SEVENTH DISTRICT.
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F. B. TIFFANY,	NINTH DISTRICT.
F. G. HAMER,	TENTH DISTRICT.

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EUGENE MOORE, . . .	SEVENTH DISTRICT.
S. M. NEVIUS, . . .	EIGHTH DISTRICT.
E. CARKHUFF, . . .	NINTH DISTRICT.
F. M. HALLOWELL, . . .	TENTH DISTRICT.

REPORTER'S NOTES.

The volume of laws quoted as the "Revised Statutes," refers to the edition prepared in 1866 by E. Estabrook.

The volume of laws quoted as the "General Statutes," refers to the edition prepared in 1873 by Guy A. Brown.

The volume of laws quoted as the "Compiled Statutes," refers alike to the first edition, 1881, and second edition, 1885, compiled by Guy A. Brown.

Acts of various years are cited by reference to volume of laws and the year in which they were passed.

This volume contains a report of decisions handed down prior to Jan. 9, 1886, except those previously reported, and some cases in which rehearings have been granted.

The syllabus in each case in this volume was prepared by the judge writing the opinion, in accordance with rule 23.

The court, at the January term, 1885, adopted new rules, which went into effect June 6. These rules appear in an appendix at the end of this volume.

Lincoln, April. 1, 1886.

PRACTICING ATTORNEYS.

Admitted since the publication of Vol. 17, and prior to
Jan. 9, 1886.

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S. E. HOSTETTER,
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THOMAS C. MUNGER,
J. S. SHREOPSHIRE,
GEORGE H. STUART.

The following amendments to rules were adopted at the July term, 1885:

Rule 3. [FAILURE OF PARTIES TO APPEAR.]—Whenever a cause is reached in its regular order on trial of cases, and either party appears in person or by attorney, the cause shall be continued to the next regular term, unless abstracts and briefs of both parties are on file, in which case it shall be submitted to the court in the same manner as if oral argument had been had.

Rule 4. [SUBMISSION OF CAUSES.]—Whenever a cause is regularly reached, and the plaintiff in error or appellant fails to appear, and his abstract is not on file, the defendant may have the case dismissed, or may submit it either with or without argument. When the defendant makes default, and there is due proof of service of summons in error or notice of appeal having been made in the cause, and abstract and brief of plaintiff are on file with proof of service thereof within the time provided by rules 7 and 8, the plaintiff may proceed *ex parte*.

The following additional rule was adopted:

Rule 27. All motions made or submitted to the court shall be in writing; and notice thereof, except motions for rehearing, shall be served on the adverse party or his attorney of record at least one day before the hearing. Such notice shall conform to the provisions of section 574 of the code, be served by a sheriff, constable, or any disinterested person, who shall be entitled to fees allowed by law for service of a summons. The return of any such officer or affidavit of any such person shall be proof of service.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1885.

PRESENT:

HON. AMASA COBB, CHIEF JUSTICE.
" SAMUEL MAXWELL, } JUDGES.
" M. B. REESE, }

DAVID E. SAYRE ET AL., APPELLEES, v. WILLIAM H.
THOMPSON ET AL., APPELLANTS.

18 33
62 223a

1. **Creditor's Bill: PETITION.** Where after judgment and before the issuance of execution thereon, the defendant removed to another county, and the plaintiffs issued an execution to the original county, which was returned wholly unsatisfied for want of goods or lands, upon a creditor's bill being brought to subject a certain other judgment to the payment of said first named judgment, on the ground that said last named judgment was held in secret trust for the debtor in said first named judgment, and said bill contained an averment "that the said defendant, William H. Thompson, has no property whatever subject to sale on execution," *Held*, Sufficient.
2. ———: **DEFENSE: ESTOPPEL.** W. H. T., a merchant, being indebted to S., sold his entire stock to L., taking time notes in payment, and afterwards, upon a colorable sale thereof, transferred said notes to B. S. brought suit against W. H. T., and attached the goods in the hands of L., claiming that the sale from W. H. T. to L. was fraudulent and void. L. replevied

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the goods. Afterwards, S. abandoned his attachment, and by stipulation released all claim for a return of the goods. B., having sued L. on the notes and obtained judgment, S. brought a creditor's suit against B. and others to have the judgment of B. against L. applied to the payment of his judgment. *Held*, That B. is estopped to set up and claim as a defense to such suit that S. obtained satisfaction of his debt by means of his attachment of the said goods.

3. —: ATTORNEYS' LIEN. S. and P., the attorneys who obtained the judgment for B. against L., having been made defendants in said creditor's suit for the purpose of cutting off their lien on said judgment for their fees, *Held*, That no question of notice of such attorneys' claim of lien could arise in said case, and that if such question could arise, that actual notice is sufficient under the statute.

APPEAL from the district court of York county. Heard below before NORVAL, J.

Sedgwick & Power, for appellants.

Brown & Ryan Brothers, for appellees.

COBB, CH. J.

This is an action in the nature of a creditor's bill, brought by certain judgment creditors of William H. Thompson against said Thompson, together with W. A. Brown, Samuel H. Sedgwick, and Frederick C. Power, for the purpose of subjecting a certain judgment at law recovered in the district court of York county by the said W. A. Brown against one James Lemon to the payment of the judgments of the said plaintiffs against Thompson.

Plaintiffs, by their petition, after setting out their several judgments against Thompson, the issuing of executions thereon respectively, and their return wholly unsatisfied, and the insolvency of Thompson, proceed to charge as follows: "That for some years prior to the 26th day of April, 1880, the defendant William H. Thompson was engaged in keeping a store of general merchandise in the

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said city of York, Nebraska, carrying on the business of a general merchant at said place, and that the claims for which the said several judgments * * * were rendered were for goods purchased by the said Thompson on credit and for money used in his said business * * * that the said Thompson being considerably indebted, for the purpose of cheating and defrauding his creditors and for the purpose of placing his goods and property beyond the reach of his creditors * * * and particularly the plaintiffs, did, on the 26th day of April, 1880, pretend to sell and did deliver to one James Lemon all his goods merchandise, book accounts, and property subject to execution or legal process, for the consideration of six thousand dollars, five hundred dollars of which was paid at the time of said pretended sale, and for the balance of five thousand five hundred dollars the said Thompson took the unsecured notes of the said Lemon, payable as follows: Five hundred dollars payable in sixty days after the date of the sale, and five hundred dollars every two months thereafter, thus extending the time for the payment of said notes over the period of twenty-two months, all of which was done by the said Thompson with the view and for the purpose of cheating and defrauding his creditors and particularly these plaintiffs.

* * * "That the said defendant Thompson, for the purpose of hindering and defrauding his creditors in the collection of their just claims, and particularly the plaintiffs, did send and remove the aforesaid notes of the said James Lemon out of the state of Nebraska, and beyond the jurisdiction of the courts of this state, and secreted said notes that they might not be made subject to the payment of the debts due his creditors, and especially these plaintiffs, whereby these plaintiffs and each of them were wholly unable to come at the same or any part of them.

* * * "That on the 10th day of July, 1882, ten of the said notes were sued by W. A. Brown in the district

court of York county, as the owner of the same, and judgment was rendered by said court in favor of W. A. Brown, against James Lemon, on the 18th day of September, 1883, for the sum of six thousand eight hundred and seventeen dollars and eighty three-cents, which said judgment is still wholly unsatisfied and of record appears to be the property of the said W. A. Brown. The plaintiffs allege that the assignment under which the said defendant W. A. Brown claims to be the owner of, and as such sued upon, said notes, was fraudulent and colorable only, and was made by said Thompson and received by said Brown with that intent, and for no other purpose, and as part of the scheme of said Thompson to cheat, hinder, and delay the creditors of the said defendant Thompson in the collection of their just claims, and especially to hinder and defraud these plaintiffs.

* * * "That said assignment was without consideration, and was made solely for the purpose of placing said notes and the avails thereof beyond the reach of the creditors of the said Thompson, and particularly of these plaintiffs. And the said defendant W. A. Brown has no equitable right to or interest in the same, but that he holds them for the use and benefit of the said defendant Thompson," etc., with the usual allegations of conspiracy and confederation against the defendants Thompson and Brown.

The plaintiffs, in and by their said petition, also allege that the defendants Sedgwick & Power, as attorneys, brought the action for the said defendant W. A. Brown on the notes given by Lemon as heretofore stated, and obtained judgment on the same as in said petition before stated, and for such services said Sedgwick & Power have pretended to file an attorney's lien on said judgment for the sum of one thousand dollars, as the alleged value of their services in obtaining the said judgment against Lemon, as aforesaid, which said sum of one thousand dollars the plaintiffs allege is greatly in excess of the value of

said services, even if the said Sedgwick & Power are entitled to a lien on said judgment for said services, etc., with prayer for injunction and relief, etc. And also "that the court inquire and ascertain whether the said Sedgwick & Power are entitled to a lien on said judgment for their services, and if such lien shall be allowed an enquiry be had as to what said services were reasonably worth," etc., with prayer for general relief.

Each of the defendants, except Thompson, answered, and replications being made thereto, the pleadings present the several questions hereinafter stated.

A trial was had to the court, a jury being waived. The court found all the allegations of the plaintiffs' petition to be true excepting as to the lien of Sedgwick & Power. And further found in favor of the defendants Sedgwick & Power, in respect to their said lien, that their services as such attorneys in prosecuting said notes to judgment were rendered in good faith, were of the value of seven hundred and fifty dollars, that no part thereof has been paid, that a written notice of such lien was duly filed, of which the said James Lemon and each of the plaintiffs had actual notice.

A final judgment was entered in accordance with the said findings, from which the cause is brought to this court on two appeals.

The appeal of W. A. Brown, defendant, presents the following points:

1. Are plaintiffs entitled to relief by creditor's bill before the issuance of an execution against their debtor directed to the sheriff of the county in which he resided at the time of its issuance, and its return unsatisfied in whole or in part?

2. Are the plaintiffs entitled to proceed by creditor's bill after having caused to be levied upon and seized by the sheriff of the county, upon executions issued by them against their judgment debtor, sufficient goods and chat-

tels to satisfy their said judgments as the property of said judgment debtor, and upon the same being replevied by one James Lemon, having by stipulation released and surrendered all claim thereto and of a return thereof?

3. The finding of the court that, "Afterwards said Thompson transferred said notes so taken to his co-defendant, W. A. Brown, in whose name suit was brought on ten of said notes, against said James Lemon, and judgment thereon recorded therein in this court on the 18th day of September, 1883, for the sum of \$6,817⁸⁸/₁₀₀ and costs; that said judgment is wholly unsatisfied, that the said purchase of the said notes by Brown from the said Thompson, and recovery of judgment, was a part of the fraudulent scheme and device of the said Thompson and the said Brown to hinder, defraud, and delay the creditors of the said Thompson, especially the plaintiffs, in the collection of their just debts and judgments due from the said Thompson, and that therefore the said W. A. Brown is the equitable trustee of the plaintiffs as to their above named judgments," etc., is not sustained by the evidence, and that the judgment is not sustained by the evidence.

Upon the first point, the Nebraska cases cited by counsel for defendants fall short of sustaining their position. The case of *Weil & Cahn v. Lankins*, 3 Neb., 384, decided but a single point, to-wit: "That an attaching creditor cannot maintain an action in the nature of a creditor's bill to have an alleged fraudulent conveyance from his debtor set aside, such action can only be maintained by a judgment creditor." The other two cases cited—*Weinland v. Cochran*, 9 Neb., 482; *Crowell v. Horacek*, 12 Id., 622—simply follow this and go no further.

The case of *Reed v. Wheaton*, 7 Paige's Chan., 663, goes further, and holds that "where a creditor's bill is founded upon a judgment in the supreme court or a decree of the court of chancery, so that an execution thereon may be issued to any county, the complainant must show affirm-

actively in his bill that he has exhausted his remedy by issuing an execution to the county in which the defendant resided at the time when such execution was issued, or he must state in his bill some sufficient legal excuse for issuing his execution to a different county."

In that case it appeared from the pleadings that the defendant, who had formerly resided in Genesee county, where the judgment was rendered, had at the time of the issuance of the execution to the sheriff of Genesee removed across the line into Niagara county, and then lived at a place in the latter county about ten miles from his former residence, "and that if an execution had been issued to that county it could have been levied upon personal property, which he had there and which was subject to sale on execution, sufficient to have satisfied the debt and costs."

This case is followed by that of *Mer. and Mechanics Bank v. Griffith*, 10 Paige, 519; also, by *Wheeler v. Heenman*, 3 Sand. Ch'y, 650, and *Smith v. Fitch*, Clarke's Ch'y, 183.

In the former of these cases the court queries, "Whether a positive averment in the bill that the defendant has no real or personal estate whatever in the county where he resides, which is liable to a levy and sale by execution, would be a sufficient legal excuse to authorize the filing of a creditor's bill upon the return of an execution issued to another county."

This query, I think, should be answered in the affirmative. Such an averment would present an issue which the plaintiff would be bound to prove, and upon its proof the necessary fact, and the only one which the return of an execution issued to the proper county would tend to prove, would be established before the court.

In the case at bar the petition contains the following allegation: "That the said defendant, William H. Thompson, has no property whatever subject to sale on execution." This allegation is not denied by any of the defend-

ants and must therefore be taken to be true, and while it is not as full as it might and should have been, it will in view of the other facts admitted and proved in the case be held sufficient.

Upon the second point it appears from the answer of defendant Brown, and reply of plaintiffs thereto, that upon the commencement of the several original actions against the defendant Thompson by the respective plaintiffs therein, writs of attachment were issued in each of such cases, and goods attached thereon sufficient to satisfy each of said claims. Said goods were afterwards replevied by Lemon, who claimed the same under a sale to him by defendant Thompson. The several plaintiffs in said actions—joint plaintiffs in the case at bar—finally yielded to this claim of Lemon and submitted to the replevin suit.

I think that the most that can be claimed for this part of the proceeding is, that the plaintiffs thereby ratified the sale from Thompson to Lemon. Brown, by bringing suit and recovering judgment against Lemon on the notes given by him to Thompson upon said sale, also ratified the said sale, and is estopped to deny the ownership of Lemon in said goods, or to predicate any defense upon the fact of plaintiffs' recognition of such ownership. I therefore deem it unnecessary to discuss or decide upon the question of law raised by counsel for defendant on this point.

The third point attacks the findings of the district court on the merits of the case. The defendant W. A. Brown claims to be a *bona fide* purchaser of the Lemon notes for their full value without notice of any infirmity or defense, and in his deposition taken to be used on the trial in his suit against Lemon on the said notes, which deposition was also introduced and admitted as evidence on the trial of the case at bar, he testified that he bought the notes, ten in number, calling for five hundred dollars each, from W. H. Thompson, on or about the first day of January, 1881; that he paid \$2,250 down on the said purchase, and gave

Thompson his own notes, to-wit: Four notes for four hundred dollars each and one for two hundred and fifty dollars. That the money which he paid down he had had for a long time; that a part of it, over one thousand dollars of it, he brought with him from Iowa when he came to this state. That he took the money which he paid Thompson, at the time he paid him, out of a trunk in which he had always kept it. That the trunk was kept in the store-room at the railroad depot. That his business was that of telegraph repairer on monthly wages. That his wages averaged \$70 per month. •

There was a large amount of testimony taken and introduced on the part of the plaintiffs, mostly in the form of depositions of witnesses residing in the state of Iowa, at and near the place of the former residence of the defendant Brown, as to his business, property, and means while he resided there, and at the time of his departure for this state. It is not deemed necessary to quote any of this testimony, but only to say that upon careful examination of it I think it amply sufficient, in a case of fraud, to call upon the said defendant to show by evidence other than his own that he possessed the money which he claims thus to have parted with, and to explain the source from which it was derived more explicitly than he has done. He also stated in his deposition above referred to, that after paying Thompson the \$2,250 at the time of the purchase of the notes, he had a large amount of money—over fifteen hundred dollars left. It appears from the deposition of the father-in-law of Brown, and he is substantially corroborated by a dozen or more of his neighbors, that Brown left Iowa for Nebraska in the fall of 1879, and at that time he was absolutely without money, property, or means of any kind, and that for the following two years he had supported his family, consisting of a wife and two children, who remained in Iowa. It seems to me that if he in fact acquired the sum of four thousand dollars, over and above his personal expenses and

what he contributed to the support of his family, within the time intervening between the time of his leaving his home in Iowa and the date of the alleged purchase of the notes in question, he would be able to show from what source and in what manner he acquired it; and I think there was sufficient evidence against him to cast upon him the burden of making such showing. And in the absence of any evidence on his part tending to support his own claim of possessing the money which he claims to have paid for the notes, I think the evidence on the part of the plaintiffs sufficient to sustain the findings of the court.

The appeal of the plaintiffs raises the question of the finding of the district court in favor of the defendants Sedgwick & Power sustaining their claim to a lien upon the judgment against Lemon for the amount of seven hundred and fifty dollars, their fees in the case in which said judgment was rendered. The plaintiffs, by their petition, question the amount due the said Sedgwick & Power for their services and disbursements in obtaining the said judgment, but do not directly deny their right to a lien for whatever such services and disbursements were really worth. Plaintiffs, in their reply to the answer of Sedgwick & Powers, "say that the attorneys, Sedgwick & Power, were not entitled to have and enforce an attorney's lien against said judgment for their services in recovering the same, for the said attorneys have never served upon James Lemon, the judgment defendant, a notice of said claim of a lien," etc.

Our statute provides, Comp. Stat., Ch. 7, Sec. 8: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

This I understand to be but a re-enactment of the common law.

Weeks, in his work on Attorneys at Law, p. 609, quotes Lord Mansfield as saying, in *Welsh v. Hole*, 1 Doug., 338: "An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands he may retain the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court they will prevent its being paid over until his demand is satisfied. I am inclined to go still further, and to hold that if the attorney gives notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice."

I do not see how the question of notice could arise between attorney and client, but only between the attorney of the successful party to a suit or proceeding and the unsuccessful party, who is, by force of the judgment in such suit or proceeding, held to the payment of money, and then only where such party claims to have paid such money to some other party without notice of the lien of such attorney. If the question of notice could not have arisen between Brown and his attorneys as to their fees, I don't see how it can arise between them and the plaintiffs, who seek to be declared the *cestui que trust* of Brown as to the said judgment. Even if the question of notice does arise between them, they, as well as Lemon, have actual notice of the claim of defendants Sedgwick & Power, and that is all that is necessary to comply with the terms of the statute, as I understand it. As to the amount of the said lien or the value of the services of said Sedgwick & Power in prosecuting said notes to judgment, whatever might be the opinion of this court were the question presented to them originally, it cannot be questioned that the finding and judgment of the court on that branch of the case as well

as upon the other is amply sustained by the evidence. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., concurs.

REESE, J., having been of counsel in a collateral proceeding, took no part in the decision.

JAMES G. MCCLAY, JR., WILLIAM MANGAN, AND JOHN FORD, PLAINTIFFS IN ERROR, v. NANCY WORRALL, DEFENDANT IN ERROR.

1. **Liquors: DAMAGES BY SALE OF: ACTION BY PAUPER.** A poor person dependent for support upon a relative, according to the provisions of chapter 67, Comp. Stat., may, in his own name and for his own benefit, maintain an action against a vendor of intoxicating drinks for the loss of such support, caused by the death of such relative, when such death occurs in consequence of the traffic of such vendor in intoxicating drinks, without any action of the county commissioners in that behalf.
2. **Challenge to Jurors.** When such action is brought against two or more defendants they are entitled to no more peremptory challenges of jurors than where the action is against a single defendant.
3. **Instructions.** Certain instructions prayed by defendants and refused by the court examined, and *Held*, Properly refused.

ERROR to the district court for Nemaha county. Tried below before BROADY, J.

Stowell & Kelligar, J. C. Watson, E. W. Thomas, and G. B. Beveridge, for plaintiffs in error.

Osborn & Taylor, for defendant in error.

COBB, CH. J.

This action was brought by the defendant in error for the loss of her support, in the homicide of her only son, Davis S. Worrall, who was killed by one Mark Hall, on the 4th day of July, 1884, at North Auburn, Nemaha county. The action was brought against the plaintiffs in error, James G. McClay and William Mangan and John Ford, co-partners in business as Mangan & Ford, on the ground that they, being at the above date saloon keepers at said place engaged in selling intoxicating liquors, both the said McClay and Mangan & Ford, at their respective saloons sold and furnished to the said Mark Hall and the said Davis S. Worrall intoxicating liquors, which they then and there drank, that they thereby became intoxicated and by reason of such intoxication they became engaged in a wrangle, and the said Mark Hall assaulted the said Davis S. Worrall with a billiard cue and killed him, thereby causing the loss of support to his aged mother, the plaintiff.

It was proved on the trial that the plaintiff is fifty-nine years of age, that she is a widow, and has been for twenty-one years; that she is and has been for the last ten years of delicate and failing health, and unable to perform manual labor except to a very limited extent; that she has no property or means, except a very few cheap household goods; that she has for ten years, up to the time of the death of her son, Davis S. Worrall, lived with and been supported by him by means of his labor; that she has no son now living; that she has four daughters all of whom are married, and none of whom have any property or means for the support of plaintiff. It also appears that the said Davis S. Worrall was, at the time he was killed as aforesaid, of the age of twenty-three years, and unmarried; that he was engaged in cultivating rented land; that he owned a team and a few agricultural implements, but was in debt for a portion of them; that he was a strong, healthy man, industrious and of good habits.

It was also proved, as well as admitted in the pleadings, that at the time of the death of Davis S. Worrall the defendants, McClay by himself and Mangan & Ford together as partners, were engaged in selling malt, vinous, and intoxicating liquors at Auburn. It was also proved that on the day in question, and before the altercation in which Davis S. Worrall lost his life, both McClay and Mangan & Ford at their respective saloons in Auburn, by themselves and their respective barkeepers, sold and furnished both to Davis S. Worrall and Mark Hall, the man who killed him, intoxicating liquors at different times, which they severally drank, and by means of which they both became intoxicated; that by reason of such intoxication they quarreled and Hall struck Worrall with a billiard cue, from the effect of which he soon afterwards, and on the same day, died.

The jury found a verdict for the plaintiff, and assessed her damages at one thousand dollars. The cause was brought to this court on error.

The first error assigned was raised by demurrer to the petition and by objection to the introduction of any testimony under it, on the ground of the insufficiency of the petition to state a cause of action. The point is stated by counsel in their brief in the following language:

“First. Because she does not belong to either of the classes named in the statute upon which she founds her action.

“Second. Because her claim is for support as a pauper, and she does not show that her pauperism in any way grows out of or is justly attributed to the liquor traffic, and if she claims as a pauper she has no right of action for support in her own name, under the provisions of the Slocum law. The law by Sec. 17 having provided a specific remedy to compel the support of paupers, that remedy must be strictly followed.

“Third. That if she had a legal right to support at the hand of her adult son, Davis S., which she could enforce in

this action, that legal right depended upon the provisions of chapter 67 of the statutes relating to paupers, and before she could recover in this case she must allege facts in her petition and prove the same on the trial establishing a full compliance with the provisions of that act, and in addition she must allege and prove that Davis S. was of sufficient ability to support her as is contemplated by the pauper act, all of which she fails to do."

The following is the provision of statute above referred to—Sec. 1, chap. 67, Comp. Stats.: "Every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers, or sisters of such poor person, if they or either of them be of sufficient ability; and every person who shall refuse to support his or her father, grandfather, mother, grandmother, child, or grandchild, sister or brother, when directed by the county commissioners of the county where such poor person shall be found, whether such relative shall reside in the same county or not, shall forfeit and pay to the county commissioners, for the use of the poor of their county, such sum as may be by the county commissioners adjudged adequate and proper to be paid, not exceeding ten dollars per week, for each and every week for which they or either of them shall fail or refuse, to be recovered in the name of the county commissioners, for the use of the poor aforesaid, before a justice of the peace or any other court having jurisdiction; *Provided*, That whenever any persons become paupers from intemperance or any other bad conduct, they shall not be entitled to support from any relative except parent or child; *And provided further*, That such poor person entitled to support from any such relative may bring an action against such relative for support, in his or her own name and behalf."

This statute declares the liability and legal obligation of

the relatives designated to support the class of poor persons therein named, and provides the manner by which the poor fund of the county may be reimbursed in cases where such relatives, being of sufficient ability, shall neglect or refuse such support after being required to furnish it. But it also provides that such poor person may avail himself of the right to support therein declared, without resort to the overseers of the poor. It was clearly the object of the second proviso to the section above quoted to open an avenue to the compulsive support of the class of persons therein contemplated, not through the poor-house, but through the courts of justice. In such cases it is the court and not the county commissioners as overseers of the poor which may decide upon the status of such poor person and the ability of the relative to furnish such support.

The case at bar was brought under the provisions of chapter 50, and the plaintiff need only invoke the provisions of chapter 67 for the purpose of establishing one link in the chain of law constituting her right to recover, to-wit: The legal obligation resting upon a son of whatever age, being of sufficient ability, to support his aged, infirm, and destitute mother. Sec. 18 of chapter 50, Comp. Stat., provides that, "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic," etc. The context sufficiently shows that the traffic here mentioned is the traffic in malt, spirituous, and vinous liquors and any intoxicating drinks, and by the provisions of section 11, the provisions of section 18 are made to apply to all persons engaged in such traffic, whether licensed or not.

The foundation of the plaintiff's right to damages against the plaintiffs in error is, that by means and in consequence of their traffic she has sustained the loss of that support which the law of the state as well as the law of nature gave her a right to, at the hand of her son. *Non constat* that but for his untimely death in consequence of such traffic

McClay v. Worrall.

she would ever have occasion to invoke the laws of the state against him for such support. It may be and is granted, that in an action under the proviso above quoted by one relative against another for support, the ability of such relative would have to be alleged and proved, and it is equally true that in the case at bar the plaintiff must have alleged and proven facts sufficient to establish a legal and reasonable expectancy that but for his death her son would have continued in the future as in the past to possess the ability to support her. This she has done, and none the less so because his ability as proved consisted less in accumulated property than in strong arms and a willing heart.

The second error assigned is, because the court erred in refusing to allow the defendants below the number or challenges they were entitled to by law, and in refusing to allow to each of the defendants three peremptory challenges they were entitled to by law. This point is not urged in the brief and may be considered as abandoned. It may not be out of place, however, to observe that it was held by this court in the case of *Kerkow et al. v. Bauer*, 15 Neb., 150, that a suit of this character may be brought "against any and all persons jointly or severally who sold, gave, or furnished any intoxicating liquor which was drunk by him on the day or about the time of such intoxication," and there can be no doubt of the correctness of such holding. When such action is a joint one as to the defendants, they are, however numerous, but one party to the action, and are all together entitled to no greater number of peremptory challenges of jurors (if any) than though there was but a single defendant.

The third assignment of error is based upon the claim of the inadmissibility of any testimony under the pleadings, and presents the same question as that considered under the first head.

The fourth error assigned is predicated upon the refusal

of the court to give to the jury instructions Nos. 2 and 3 of instructions prayed by defendants.

These instructions present the same point as that presented under the first error assigned, and which we have already considered sufficiently for the purposes of this opinion.

The fifth is upon the refusal of the court to give instructions numbered 4, 5, 6, 7, 8, 9, and 10 of defendants' prayers, and the giving of instructions 5, 6, and 7 of plaintiff's prayers.

The prayers of defendants above referred to appear in the record as follows:

"No. 4. And the jury are instructed that under the statutes above named it is incumbent upon the plaintiff to prove the intoxication of Davis S. Worrall and Mark Hall, and that the defendants, while the said Mark Hall and Davis S. Worrall were disqualified by intemperance, sold or gave Mark Hall or Davis S. Worrall intoxicating liquors which contributed to their intoxication.

"No. 5. The jury are instructed that it is incumbent upon the plaintiff to prove that the damage to the means of support of plaintiff was caused solely and alone from intoxication, and that these defendants either sold or gave intoxicating liquors which contributed to or caused the intoxication.

"No. 6. The jury are further instructed that if any other cause conspired with the intoxication to produce the death of Davis S. Worrall, and that the cause of such death cannot be traced directly and proximately to intoxication, and that intoxication was not wholly or in part induced by sale or gift of intoxicating liquors by these defendants, then they must find for defendants.

"No. 7. In determining whether the intoxication was the immediate or proximate cause of the death of the deceased, the jury should consider whether the causes which actually produced the death were such as naturally resulted as a consequence of the intoxication, and of such kind as

might have been reasonably anticipated by a reasonable person. If they were not such then the intoxication cannot in law be regarded as the immediate and proximate cause of the death, and the defendants are not responsible therefor.

"No. 8. In determining whether an act is the proximate cause of an injury, the legal test is, was the injury of such a character as might reasonably have been foreseen or expected as the natural result of the act complained of? A party is not, in law, chargeable with results which do not naturally and reasonably follow as the consequences of his conduct.

"No. 9. An act is the proximate cause of an event only when, in the natural course of things and under the peculiar circumstances surrounding it, such an act would naturally produce the event, and in order to create a legal liability for damages the injury must be such as a man of ordinary experience and sagacity could foresee might probably ensue from said act. The relation of cause and effect must be shown to exist between the act complained of and the injury, and this relation of cause and effect cannot be made out by including the illegal act of a third party.

"No. 10. The damages to be recovered in an action must always be the natural and proximate consequence of the wrongful act complained of. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief or injury, the first must be considered as too remote."

The first of the above instructions (No. 4) is to the effect that in order to hold the defendant liable for the damages resulting from the intoxication of the persons named, they must be shown to have been already intoxicated when the defendants furnished them intoxicating liquors. Such is not the law. The defendants are liable for furnishing the means of intoxication—as well the first draught by which the state of intoxication was initiated as

subsequent ones by which it was continued and inflamed. And such would be true even were it in proof, which it is not in this case, that defendants furnished the first draught while the subject of the intoxication was perfectly sober, and the liquors which intensified and completed the intoxication were furnished by other parties, so that when the careful and responsible liquor dealer sells a glass of brandy to be drunk as a beverage, he takes the chance of his customer completing the intoxication thus began at the bars of less careful dealers and upon a lower grade of intoxicating liquors; and where legal damages result from such intoxication, each dealer is equally liable. See *Elshire v. Schuyler*, 15 Neb., 561.

By the 5th and 6th prayers the court is asked to tell the jury that the plaintiff cannot recover unless the death of Davis S. Worrall was caused solely by the traffic of the defendants. I understand the law to be otherwise, and that if—whatever the fatal cause was—if it was inspired or contributed to by the state of intoxication caused in whole or in part by the said traffic of the defendants, they are liable.

The 7th, 8th, 9th, and 10th prayers were predicated upon the theory that it is necessary to a recovery in an action of this kind that the death or damage should be the natural and logical result of the act of selling or giving intoxicating liquors, and that the traffic of the vendor must be the proximate and not the remote cause; also, that the death or damage must be such as might have been reasonably anticipated by a reasonable person.

In addition to what is above stated, attention is called to the provision of the statute. The language of section 13, chap. 50, when we consider the subject to which it is applied, forbids the construction that the damages therein spoken of must be direct or proximate. In that sense, how is it possible that a traffic—that is, selling an article—could damage any one? Possibly the purchaser would be

directly and proximately damaged to the extent of the price, providing he paid for the article purchased, but clearly that is not the damages which the legislature had in view when they enacted the statute. Again, it is quite possible that an individual might be damaged by the use of the article trafficked in to the extent of his health or of his life. But who will say that the drinking of alcoholic liquors logically follows its sale and purchase. But how can the traffic logically or proximately damage the community? Clearly in no way, and the statute expressly provides that those engaged in the traffic shall pay all damages which the community may sustain by reason thereof. Such damages may be indirect and remote as long as they can be traced to the traffic as the inspiring, aggravating, or assisting cause.

It is not necessary, as it appears to me, that the damage should be such an one as might be foreseen or anticipated by a reasonable person as a consequence of such traffic, or that it should naturally flow therefrom. A man under the influence of intoxicating liquor does not act naturally, nor do the rules laid down by Locke or Bacon afford any clue to the dark and devious paths which he may follow to his own destruction or that of others.

None of the instructions express the law as applicable to the facts of the case, and there was no error in their refusal.

The other points assigned as error in the petition in error, not being urged in the brief or at the hearing, will not be examined.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	54
21	571
18	54
40	203

JAMES PHILPOT, PLAINTIFF IN ERROR, V. THE SANDWICH MANUFACTURING CO., DEFENDANT IN ERROR.

SAME V. SAME.

1. **Infant.** Contracts of an infant, other than for necessities, are voidable only, and upon coming of age he may affirm or avoid in his discretion.
2. ——. If an infant purchase personal property and give his promissory note therefor, he can not, upon arriving at the age of twenty-one years, retain the property and plead infancy as a defense to the note.

ERROR to the district court for Nemaha county. Tried below before BROADY, J.

J. H. Haldeman, for plaintiff in error.

E. H. Wooley, for defendant in error.

MAXWELL, J.

These are two cases between the same parties, in which substantially the same questions are presented, and they will be considered together. The actions were brought upon certain promissory notes given by the plaintiff and one John Beadle for certain machinery. The defense set forth in the answers was, that "the said James Philpot was an infant within the age of twenty-one years." On the trial, a jury being waived in each case, the court made special findings of fact, which in the first case submitted are as follows:

1st. The court finds that when the defendant James Philpot signed the note sued on in this action, he was an infant under the age of twenty-one years, and that he arrived at his majority on or about March 10, 1883; that after the maturity of said note, and after said Philpot had

arrived at full age, and before commencement of this action, he, said Philpot, made payments on said note, and promised the agent of plaintiff, who held said note for collection, that he would pay the balance due on said note if the defendant Beadle did not pay the same, and if plaintiff could not get said balance of said Beadle. That said Beadle did not and has not paid said balance, and plaintiff has not and could not get said balance of said Beadle. That when said Philpot made said promise he did not know he was not legally liable to pay said note, and that there is due and unpaid on said note the sum of \$58. To which Philpot excepts.

2d. As a conclusion of law, the court finds that the defendant, James Philpot, is liable to plaintiff on said note, and that plaintiff is entitled to recover thereon against said Philpot said sum of \$58.

The finding in the second case is substantially the same as in the first, except as to payment and the amount.

There is a want of harmony in the decisions in regard to the liability of an infant upon his obligations. Thus, Coke states the rule to be that an infant will not be bound by a personal obligation even where it is given for necessities. Co. Litt, 172b.

In *Keam v. Boycott*, 2 H. Black, 511, Chief Justice Eyrie laid down the doctrine that where the court could pronounce the contract for the benefit of the infant as for necessities, it was valid; where the court found the contract prejudicial to the infant it was void; and in cases where the benefit or prejudice was uncertain the contract was voidable only. Judge Story declared these instructions to be founded on solid reason. 1 Mason, 82. In this country the courts, at the present time, generally divide the contracts of an infant into those for necessities, which are binding upon him; and other contracts, which are voidable at his election on coming of age. The well settled rule, therefore, is that a negotiable note of an infant is not void but voidable only. *Goodsell*

v. Myers, 3 Wend., 479. *Wright v. Steele*, 2 N. H., 51. *Best v. Givens*, 3 B. Mon., 72. *Keil v. Healy*, 84 Ill., 104. *Irwin v. Irwin*, 9 Wall., 617. After an infant has arrived at the age of twenty-one years he may disavow or ratify any contracts not made for necessities. In the absence of any statute providing how a contract shall be ratified, any one of three modes ordinarily will be sufficient. 1st. An express ratification. 2d. Acts which imply an affirmation. 3d. The omission to disaffirm in a reasonable time. The particular acts which constitute a ratification must necessarily depend to a great extent on the nature of the contract. When it is executed and beneficial to the infant—as where he has purchased real estate—it vests in him the freehold until he disagrees to it, and the continuance in possession after he is of age is an implied confirmation of the contract. So as to a lease. *Delano v. Blake*, 11 Wend., 85. *Jones v. Phenix Bank*, 4 Seld., 228. And an infant can not be permitted to retain personal property purchased by him, and at the same time repudiate the contract upon which he received it. *Kitchen v. Lee*, 11 Paige, 107. *Lynde v. Budd*, 2 Id., 190. *Deason v. Boyd*, 1 Dana, 45. *Cheshire v. Barrett*, 4 McCord, 241. *Ottman v. Monk*, 3 Sandf., 431. He who asks equity must do equity. In the case at bar the purchase was a joint one. The plaintiff, after coming of age, so far as appears, made no offer to return the property, but still retains possession. He also made payments on the notes. This we regard as a sufficient affirmation of the contract. The law which enables a party who has purchased property during infancy to disaffirm on coming of age, is to be used as a shield and not as a sword—as a means by which he may be discharged from a contract which he deems prejudicial. The object is not to enable him to rob others of their property, but upon making restitution to be discharged from the contract. The fact that when Philpot made the promise, after coming of age, to pay the notes, he did not know that he was not

Bohanan v. State.

legally liable to pay said notes, is not material in this case, and need not be considered, there being a sufficient ratification by other acts of the plaintiff. The plaintiff in error has the property, the fruit of the contract. There is no claim or charge that it was of less value than the price agreed to be paid. Honesty and fair dealing require that he should pay for the same. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

QUIN BOHANAN, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **MURDER: VERDICT OF LOWER DEGREE ON SECOND TRIAL.**
Where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial.
2. **JURORS: COMPETENCY.** If upon examination of a juror it is shown that he has an opinion founded upon newspaper reports, and it shall satisfactorily appear that the character of such opinion is such that it will not interfere with his rendering an impartial verdict, it is not error to admit him to the jury.
3. **ATTORNEY: ARGUMENT OBJECTED TO, EXCEPTIONS MUST BE TAKEN.** When it is alleged that an attorney, in the argument of a cause on trial to a jury, went outside of the record and appealed to the passions and prejudices of the jury, the attention of the court should be called to the language and conduct of the attorney by the proper objection and a ruling had thereon by the court. If the objection is overruled and an exception taken to the ruling, the question may be reviewed in the supreme court upon the decision of the trial court. Without such ruling and exception there is nothing for the reviewing court to consider.

18	57
45	277
45	896

18	57
45	443

18	57
54	133

18	57
459	187

ERROR to the district court for Otoe county, where the cause was taken on change of venue from Lancaster county. Tried below before POUND, J.

C. E. Magoon and *O. P. Mason*, for plaintiff in error, cited: *Stuart v. Commonwealth*, 28 Gratt., 950. *People v. Gilmore*, 4 Cal., 376. *Barnett v. People*, 54 Ill., 325. *People v. Knapp*, 26 Mich., 112. *State v. Martin*, 30 Wis., 216. *Dawson v. State*, 65 Ind., 422. *Warnock v. State*, 6 Tex. App., 450. *State v. De Laney*, 28 La. Ann., 484. *Miller v. State*, 58 Ga., 200. *Guenther v. People*, 24 N. Y., 100. *Jones v. State*, 13 Tex., 184. *State v. Smith*, 53 Mo., 139. *Johnson v. State*, 29 Ark., 31. *Cooley Cons. Lim.*, § 328, and cases cited. 1 Bishop Crim. Law, § 676. 1 Wharton Crim. Law, § 550, and cases cited. *State v. Lessing*, 16 Minn., 75. *State v. Belden*, 35 Wis., 120. *Brennan v. People*, 15 Ill., 517.

William Leese, Attorney General, and *J. B. Strode*, District Attorney, for the State, cited: *State v. Behimer*, 20 Ohio State, 572. *Jarvis v. State*, 19 Id., 585. *Leslie v. The State*, 18 Id., 394. *People v. Keefer*, 3 Pac. Rep., 818. *State v. McCord*, 8 Kan., 232. *State v. Tweedy*, 11 Iowa, 350. *Sanders v. The State*, 85 Ind., 318. *State v. Morris*, 1 Blackf., 37. *Commonwealth v. Arnold*, 6 Crim. Law Mag., 61. *Baldwin v. The State*, 12 Neb., 64. *Cooley Cons. Lim.*, 327.

REESE, J.

The plaintiff in error was indicted by the grand jury of the February term, 1882, of the district court of Lancaster county. There was but one count in the indictment. The crime charged was murder in the first degree. A trial was had at the following May term of court, which resulted in a conviction of murder in the second degree. Plaintiff in error then brought the cause into the supreme

court, where the judgment of the district court was reversed and a new trial ordered. See *Bohanan v. The State*, 15 Neb., 209. A change of venue was then taken by which the place of trial was removed from Lancaster to Otoe county. On the second trial the jury found him guilty of murder in the first degree. A motion for a new trial was made and overruled, and the court imposed upon him the penalty of death. He now prosecutes error in this court.

Prior to the commencement of the last trial the plaintiff in error filed in the district court a plea of former acquittal of the charge of murder in the first degree. This plea contained a recital of the facts of the previous trial on the same indictment, and the conviction thereon of murder in the second degree and his sentence to the penitentiary for life. To this plea the state made answer, alleging that the plea ought not to be sustained for the reason that on defendant's own motion the verdict and judgment were set aside and a new trial granted. Plaintiff in error demurred to this answer. The demurrer was overruled. The plea was held bad and the first trial held not a bar to a prosecution for murder in the first degree, as charged in the indictment.

During the progress of the trial plaintiff in error requested the court to instruct the jury as follows:

"10. If the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the state of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon such trial was found guilty of murder in the second degree, and judgment was rendered against him upon such finding, then, as a matter of law, the jury in this case cannot find the defendant guilty of murder in the first degree."

The court refused to give this instruction, but instructed the jury as follows upon that question:

"11. You should not be influenced in the least by any thing that any other jury may have done."

To the refusal to give the first above quoted instruction, and to the giving of the second, plaintiff in error excepted.

By the foregoing it will be seen that the question here presented is, whether or not the verdict of the jury on the first trial, finding plaintiff in error guilty of murder in the second degree, is such an acquittal of the crime of murder in the first degree as would protect and shield plaintiff in error from the danger of a conviction of the higher crime on the second trial—the verdict and judgment having been set aside upon his own motion and request. The question here presented is a new one in this state, and is one of great importance. The question is not new in the sense of its never having decided in other states; but, unfortunately, the decisions of the courts of last resort in other states, upon the question here presented, have not been uniform. The doctrine contended for by plaintiff in error has, to a greater or less extent, been declared by the supreme courts of Virginia, California, Tennessee, Illinois, Michigan, Iowa, Mississippi, Wisconsin, Indiana, Alabama, Texas, Missouri, and Arkansas. It is not deemed necessary to notice the decisions of all those states, as some of them are simply *dicta*, and some are in cases dissimilar to the one at bar, but we will notice the reasoning in what we deem the leading cases upon the subject.

In *The People v. Gilmore*, 4 Cal., 376, the accused was indicted for murder. Upon trial the jury rendered a verdict of guilty of manslaughter, which was set aside on the prisoner's motion, and a new trial ordered. On the second arraignment he pleaded a former acquittal. Chief Justice Murray, in writing the opinion of the court, which at that time (1854) consisted of himself and Mr. Justice Heydenfeldt, argues the question at some length and with ability, but to the mind of the writer his deductions are not conclusive. From the opinion I quote as his first proposition

as follows: "A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must, by legal operation, amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty. The reason is obvious; if such were not the case the party after undergoing punishment for manslaughter might be arraigned and tried again for murder, notwithstanding he had been compelled to answer this charge upon the first trial, and the jury had passed upon the same." This is undoubtedly correct so long as the verdict of the jury is allowed to stand. It must be conceded that until the accused himself procures the cancelation of the verdict the judgment must be a complete protection against another prosecution for the same crime. So also would be a verdict of not guilty. But where the prisoner upon his own motion procures a verdict to be set aside, the rule should be otherwise. In support of his conclusion the learned writer cites *Hart v. The State*, 25 Miss., 378, and quotes as follows: "The jury in such a case, in contemplation of law, renders two verdicts. The one acquitting him of the higher crime, the other convicting him of the inferior." It is quite difficult for us to adopt this proposition. The verdict in such case must be an entirety. The prisoner stands charged with the unlawful killing of the deceased. He is either guilty or not guilty. If found guilty it is the next duty of the jury to ascertain the magnitude of this guilt. When that is done the verdict of guilty is returned with a finding as to the grade of that guilt. At the time this decision was made the criminal code of California contained the following section: "A new trial is a re-examination of the issue in the same court before another jury after verdict has been given. It places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict can not be used or referred to either in evidence or in argument."

This section was not deemed sufficient to justify the court in putting the prisoner upon his trial for murder, but the court combats the power of the legislature to enact such a law by the following: "The constitution of this state has provided that 'no person shall be subject to be twice put in jeopardy for the same offense.' Now, if I am right, that a conviction for manslaughter is an acquittal for murder, it must follow that any law that would compel a party to be re-tried for murder in order to escape the minor offense, thereby putting the party in jeopardy, is in conflict with this provision of the constitution." Thus the learned judge in the discussion of the case goes beyond the rulings of any of the other courts. The supreme courts of Kansas, Indiana, Kentucky, North Carolina, and others, have not hesitated to follow such laws and apply the principle to capital cases. And in California, in a recent decision, the supreme court has, to the mind of the writer, fully overruled the holding in *The People v. Gilmore*. In *The People v. Keefer*, reported in 3 Pacific Reporter, 818, it is held that "on a plea of former conviction under an indictment for murder, the fact that defendant was convicted of murder in the second degree will not be a bar to a conviction of murder in the first degree on a re-trial." It is insisted that this decision was made under a provision of the statute enacted in 1874, which is as follows: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment." It will be observed that in essence this section does not vary materially from the one in force at the time of the decision in *The People v. Gilmore*. It can do little more than to place the parties "in the same position as if no trial had been had," as provided in the first act. But it is worthy of notice that a careful examination

of the opinion in *The People v. Keefer* fails to disclose any reference to the act of 1874. The decision, by an unanimous court, is based entirely upon another section of the criminal code, which was passed in 1856, which divided the crime of murder into two degrees, the first and second. The section, as amended April 19, 1856, is as follows:

“Malice shall be implied when no considerable provocation, or when all the circumstances of the killing show an abandoned and malignant heart. All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime and give sentence accordingly. Every person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the state prison for a term not less than ten years and which may extend to life.”

The court, in the opinion by Judge McKinstry, uses the following language: “The indictment charges the crime of murder, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain

lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment. *People v. Haun*, 44 Cal., 98. *People v. Doyell*, 48 Cal., 94. After the act of 1856, which divided the crime into murder of the first and second degrees, *murder* remained and it still remains the unlawful killing of a human being with malice aforethought. Penal Code, 187, 188. The malice may be express or implied; the express intent to kill or to commit one of the named felonies may be affirmatively established, or, the killing being proved, the malice may be implied, but in either case the crime is murder. The fact that a severer penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who on his own motion secures a new trial subjects himself to a re-trial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree."

It will be observed that the provisions of the amended act of 1856 are very similar to the provisions of sections three, four, and four hundred and eighty-nine of the criminal code of Nebraska, except that murder in the second degree is not specifically described. The sections above referred to are as follows:

SEC. 3. "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or, if any person, by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death."

SEC. 4. "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and on conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life in the discretion of the court."

SEC. 489. "That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession, in open court, the court shall proceed by examination of witnesses, in open court, to determine the degree of the crime, and shall pronounce sentence accordingly."

By section 19 of the act of California, passed in 1850, and which, so far as we are able to ascertain, still remains upon the statute books of that state, murder is defined to be "the unlawful killing of a human being with malice aforethought, either express or implied. * * *"

In *Baldwin v. The State*, 12 Neb., 61, the then chief justice, MAXWELL, in delivering the opinion of the court, in referring to the indictment which charged, in separate counts, the crime of murder in the first degree, says: "There is but one offense charged in the indictment in this case, viz.: The unlawful killing of Allen J. Yokum." If, therefore, there is but one offense charged in the indictment in the case at bar—the unlawful killing of James Cook—it would seem that the adjudications of the state of California may well be said to sustain the action of the trial court in placing the plaintiff in error upon his trial for murder in the first degree.

In *People v. Hann*, 44 Cal., 96, the supreme court, by Judge Belcher, in speaking of the division of the crime of murder into two degrees, says: "In making the division the legislature recognized the fact that some murders comprehended within the general definition are

of a less cruel and aggravated character than others, and, therefore, deserving of less punishment. It also recognized the fact that some murders of the less aggravated class are deserving of less punishment than others of the same class, and it accordingly provided that murders of the second degree should be punished by terms of imprisonment depending for their length upon the circumstances of each particular case. In all this, however, the legislature did not intend to say that murder of the second degree should be anything less or other than murder. It did not, indeed, attempt to define murder anew, but only to draw certain lines of distinction by which it might be told in a particular case whether the crime was of such a cruel and aggravated character as to deserve the extreme penalty of the law, or of a less aggravated character, deserving a less severe punishment." The same doctrine is held in *People v. Form*, 25 Cal., 361.

In *Brennan v. The People*, 15 Ill., 511, and in *Barnett v. The People*, 54 Ill., 325, the supreme court of that state have held that a defendant cannot upon a second trial be tried for a degree above that for which he was convicted upon the first. In *Barnett v. The People* the court simply follows *Brennen v. The People*, without argument or criticism. The decision in the latter case is based upon the cases of *Slaughter v. The State*, 6 Humph., 410; *Morris v. The State*, 8 S. & M., 762; and *Hurt v. The State*, 25 Miss., 378.

In *Slaughter v. The State* the plaintiff in error was indicted for murder in the first degree, and upon trial was found "not guilty of murder as charged in the bill of indictment, but they find him guilty of voluntary manslaughter in manner and form as charged in the indictment." On his motion a new trial was granted. At a subsequent term he filed a plea of former acquittal, setting out the proceedings and verdict of the jury. He contended that he was entitled to his discharge and that he could not

be tried for any crime under that indictment. The trial court held otherwise, and put him upon trial for manslaughter. Error was taken to the supreme court, and it was held that the trial court decided correctly. The question as to whether the plaintiff in error could have been convicted of a higher crime than manslaughter was in no sense before the court. Yet it is said that if he had been tried for murder, it would have been erroneous. It is quite probable that the *finding* of "not guilty of murder," by the verdict, would make no difference as to the power of the court to put the accused upon his trial on the whole indictment, yet the court refers to it as a verdict of acquittal.

Morris v. The State, 8 S. & M., 762, was a case where the defendant was put upon trial under an indictment containing four counts: 1st. With the forgery of a bank-note of the Bank of the State of North Carolina. 2d. With uttering and publishing as true a forged bank-note of the Bank of the State of North Carolina. 3d. With having in his possession certain forged bank-notes of the Bank of the State of North Carolina, with the intent to utter the same. The 4th was similar to the 3d. The verdict of the jury was guilty as charged in the second, third, and fourth counts. The verdict was objected to as imperfect, because there was no express finding upon the first count. The cause was taken to the supreme court (Mississippi) where the verdict was held good, but the cause was reversed for error occurring in the introduction of testimony. The judgment of reversal provided that the new trial should be confined to the second, third, and fourth counts, the plaintiff in error having been acquitted upon the first count. It will thus be seen that the question in the case at bar was not before that court for two reasons. First, the question did not arise in the case. Second, each count in the indictment was for a separate and distinct offense and not for different grades or degrees of the same offense.

The case of *Hurt v. The State* (25 Miss., 378) was one in which the plaintiff in error had been indicted for murder. He filed certain pleas in abatement, alleging the illegal organization of the grand jury which found the indictment. These pleas were overruled by the court and he was put upon trial, which resulted in a verdict of guilty of manslaughter in the third degree. His motion for a new trial being overruled, he alleged error in the supreme court, and a new trial was granted upon the ground that the plea in abatement should have been sustained. The judgment of the trial court was reversed, the court holding that its judgment of reversal should extend no further than to relieve him as against the verdict *against* him (manslaughter). As a new indictment would have to be found, and as a prosecution for the crime of manslaughter was barred by the statute of limitations, the prisoner was, upon his motion, discharged. The reasoning of the court in this case seems to be based upon the acknowledged and conceded fact that if a party charged with murder and convicted of manslaughter seeks no relief from the judgment of conviction, but allows it to stand unreversed and in full force, he cannot, after serving his term of imprisonment, be again prosecuted for murder. This is most certainly true. If the judgment stands unimpeached it is the final judgment in the case, and of course will stand as a protection to the party convicted. From this the court concludes that the other proposition must follow, viz.: That if the jury convicts of a lower grade of the same crime that conviction is necessarily an acquittal of the higher grade, and that acquittal must stand for all time, notwithstanding the verdict and judgment of conviction may be set aside. That the jury, in contemplation of law, renders two verdicts; one acquitting of the higher crime and the other convicting him of the lower, and that the verdict is not an entirety. Upon this theory we think that case, as well as *Brennen v. The People*, rests. And indeed the

same may be said of *The State v. Tweedy*, 11 Iowa, 350. *The State v. Martin*, 30 Wis., 216. *State v. Belden*, 33 Id., 120. *Jones v. State*, 13 Tex., 184. These latter cases are exhaustive and well written, and were it not that they all seem to be grounded upon what seems to us to be a false basis we could well follow them.

The case of *Johnson v. The State*, 29 Ark., 31, is a full digest of all the cases so holding, and, adopting the same reasoning, holds with them.

It is beyond the comprehension of the writer to say that the *character* of an act may be finally and forever decided upon and adjudicated, while the fact of the act itself is left untouched. Thus a person is indicted for murder in the first degree under the laws of Nebraska. Upon trial he is found guilty of murder in second degree. So long as that verdict and the judgment stand unreversed there is an adjudication that the act or crime was committed, and also fixing the character or quality of the act. Now it is very clear and easily understood that this judgment and verdict will protect the accused from another prosecution. But suppose a new trial is granted. There is no adjudication that any person has been killed nor that any crime has been committed. But it is said there is an adjudication that *if* the deceased was killed by the prisoner, it was not done of deliberate and premeditated malice! It is contended that such a verdict is severable; that there are in contemplation of law two verdicts—one of guilty of murder in the second degree, which has been set aside, and one of not guilty of murder in the first degree, which, by virtue of the constitutional provisions in the federal and state constitutions, must stand. This theory is also built upon what is considered the difference between an adjudication and having been once in jeopardy. It is true that this distinction does exist to some extent, but yet if the first verdict is worth anything to a prisoner, it must be upon the theory that he has been *acquitted* in so

far as the criminal quality of the act of killing is concerned, but no further.

In *Hurley v. The State*, 6 Ohio, 400, it is decided that the simple verdict of a jury is not a sufficient acquittal to entitle a defendant to its protection, but that to be of any force there must be a judgment on the verdict, citing 2 Hale's P. C., 243.

By the statutes of this state a new trial, after a verdict of conviction, may be granted, on the application of the defendant, for certain reasons which are set out in the act. See section 490 of the criminal code. A new trial is defined to be a re-examination of an issue of fact. Bouv. Law Dic. It is a re-trial of the facts of the case. In *Zaleskie v. Clark*, 45 Conn., 401, Judge Loomis, in writing the opinion of the court, says: "It is believed that it always has been used in the sense of a complete re-trial of the cause, except in certain instances mentioned by him. What else can a re-trial be than a re-examination of the facts in the same case?"

The principal case in which it has been held, in the absence of a statute to that effect, that a defendant can be re-tried upon the whole indictment is *The State v. Behimer*, 20 O. S., 572. In fact the supreme court of Ohio have uniformly so held. In *Hurley v. The State*, *supra*, it is decided that "a verdict in either a civil or criminal case must be considered an entire thing." In *Leslie v. The State*, 18 Ohio State, 390, the plaintiff in error was indicted for murder in the first degree. The indictment contained three counts, but each alleging and charging the same offense in the same degree. On the first trial he was found "guilty of murder in the first degree as charged in the first count of the indictment, and not guilty as charged in the second count of the indictment." Upon his motion a new trial was granted, and upon the second trial he was found "guilty of manslaughter, as charged in the third count of the indictment, and not guilty as charged in the

first and second counts of said indictment." Leslie then moved the court to discharge him, for the reason that on the first trial he was found guilty of murder in the first degree, as charged in the first count of the indictment and not guilty as charged in the second and third counts, and that upon the second trial he was found not guilty upon the first and second counts of the indictment, and guilty of manslaughter upon the third count, and that the verdict of manslaughter was irregular, illegal, and void. The motion was overruled; he was sentenced to the penitentiary, and took error to the supreme court. The conviction was affirmed.

In discussing the question of the entirety of the verdict, Judge White, who wrote the opinion, says: "Where the indictment, though consisting of several counts, is founded upon a single transaction the verdict is a unit, and lays the foundation for but a single judgment. A verdict of guilty upon one of the counts and of not guilty upon the others is followed by the same legal consequences as a verdict of guilty upon all the counts; and when in either case the verdict is set aside and a new trial granted on the defendant's motion, the case is opened for a re-trial upon the counts upon which he was acquitted as well as those upon which he was convicted."

But where the several counts of an indictment are for separate and distinct offenses the rule would of course be different, and it was so held in the case under consideration. The court says, further: "We think the principle contended for properly applies where there is a conviction and an acquittal on different counts for separate and distinct offenses, or where part of the defendants are acquitted and part convicted of the same offense. But where all the counts are for the same offense, and are varied merely to meet the proof, it has no just application."

The ruling in this case was followed in *Jarvis v. The State*, 19 Ohio State, 585. In the case of the *State v. Behimer*,

supra, Judge White, in writing the opinion of the court, thus states the question for decision: "The question for decision therefore is, whether the legal effect of granting a new trial was to set aside the whole verdict and leave the case for re-trial upon the same issues on which it was first tried, or, whether the re-trial was properly limited by the court to the degree of homicide of which the defendant had been found guilty, and to the inferior degree of manslaughter." The question is discussed at considerable length and with a good degree of logic and reason, and it was finally held that the defendant in the prosecution could be put upon a second trial upon the whole of the indictment the same as though there had been no previous trial and verdict. In the course of the opinion the learned judge makes use of the following language: "But the effect of setting aside the verdict finding the defendant guilty was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty was of his innocence, and the burden was on the state to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act, while the fact of the existence of the act was undetermined. This would be a verdict to the effect that if the defendant committed the homicide, he did it without deliberate and premeditated malice.

"There can be no legal determination of the character of the malice of a defendant in respect to a homicide which he is not found to have committed, or rather, of which, under his plea, he is in law presumed to be innocent."

Upon the question of the entirety of the verdict it is said: "But upon mature consideration we are of opinion that the verdict is severable only when there is a conviction or an acquittal on different counts for separate and distinct of-

fenses, or where there are several defendants; but that where there is but one defendant, and in fact but one offense, the verdict is entire."

The cause was taken to the supreme court upon the exception of the state's attorney, and the decision could in no way affect the rights of the defendant in the prosecution, but the rule of law was stated by the court as follows: "Where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial."

It must be conceded that in point of numbers this decision seems to be against the weight of authority. But it is apparently founded upon reason, and upon the advanced idea of American jurisprudence. That it is just, it seems to us can not be questioned. That it is necessary for the protection of the law-abiding citizen is equally clear, and the fact that many of the states have incorporated a provision to that effect in their criminal laws, gives weight and force to the statement. This decision was made in the year 1870. The criminal law of the state of Ohio was adopted by the legislature of this state in 1873, almost bodily, and by the one act entitled "An act to establish a criminal code," passed March 4th of that year. By it the entire criminal law of that state was substantially transferred to the statute books of Nebraska, and in which was the law governing new trials. In *Franklin v. Kelly*, 2 Neb., 104, Chief Justice Mason, in writing the opinion of the court, says: "The rule is well settled, that when a legislature re-enacts a statute upon which a construction has been placed, it does so with the construction annexed," citing a number of cases. In addition to which we cite 2 Bishop on Criminal Law, §905, and note from *Commonwealth v. Hartnett*, 3 Gray, 450. While it may be true that the Ohio decisions can not, with

strictness, be said to be a construction of any statute, yet they are a construction of that part of the criminal code which gives to the courts of the state the power to grant new trials, and therefore of the legal status of the person to whom the new trial has been awarded. To that extent, at least, it is proper to consult those adjudications as affecting the criminal code at the time of its adoption by this state.

But the Ohio cases are not without precedent. In *United States v. Harding*, Wallace (Jr.) Reports, 127, in the circuit court of the United States for the eastern district of Pennsylvania, Harding was found guilty of murder, and Grimes and Williams of manslaughter. Soon after the trial Judge Baldwin, the circuit judge, died. A motion for a new trial was made before and argued to Judge Randall, the district judge, but before passing on the motion he died. New judges were appointed, and upon their qualification the cause came on for decision. The order of the court was that a new trial be granted to Harding, and that as to Grimes and Williams the case be continued for one week, at the expiration of which they were to elect whether they would take a new trial or abide their former conviction. Judge Grier then addressed Grimes and Williams as follows: "William Grimes and John Williams—You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offense charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offense of manslaughter. Your lives have been in jeopardy, and you have escaped. The constitution of your country declares that 'no person shall be twice put in jeopardy of life or limb for the same offense.' This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial except at your election and request. We be-

lieve that you have the right to waive the protection thrown around you by the constitution for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeited to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you. Before we enter of record an order for a new trial as to you, we will give you one week to ponder carefully on this subject, and consult with your counsel as to what will be your safest and best course."

In *State v. Commissioners*, 3 Hill (S. C.), 239, the defendants were indicted—in two counts—for obstructing a public street. The trial resulted in a verdict of guilty as charged in one count of the indictment, nothing being said as to the other. A new trial was granted upon the motion of the defendant. It was held that the next trial must be upon both counts of the indictment. In the opinion, Butler, J., says: "If the verdict of guilty had remained, it would have protected them, perhaps, against another indictment for the same offense. As long as a verdict of guilty remained on the record there was a finding. But what proceeding is there now on it? I consider all the proceedings on the indictment, since the finding by the grand jury, to be set aside at the instance and for the benefit of defendant."

As before stated, the states of Kansas, California, Indiana, and Kentucky have all held to the same doctrine. See *State v. McCord*, 8 Kansas, 232. *People v. Keefer*, *supra*. *Veach v. The State*, 60 Ind., 291. *Commonwealth*

v. *Arnold*, 6 Crim. Law Mag. (Ky.) But it is claimed by plaintiff in error that these decisions were made by virtue of the statutes of those states which provide in substance that when a new trial is granted the parties shall be in the same position as if no trial had been had, some also providing that the first trial and verdict shall not be referred to on the second trial, nor shall the first verdict be plead in bar of a conviction on the second trial either in the evidence or argument. It is true the decisions referred to have in some instances been predicated upon the statutes referred to, and did a similar statute exist in this state much of the trouble in this case would be obviated. But it may also be observed that if the clause in the bill of rights in both the federal and state constitutions—that a defendant shall not be twice put in jeopardy of life or limb for the same offense—is to be his protection, as argued by his counsel, it is quite clear that a simple legislative enactment of the states cannot override or take away this protection, and the enactments referred to would be unconstitutional and void, and would form no basis for the decisions. While many courts holding to the doctrine contended for by plaintiff in error have based their argument, to some extent, upon these constitutional provisions, we know of none holding the statutes authorizing a second trial upon the whole indictment void.

Again, should we adopt the reasoning of the court in *People v. Gilmore*, *supra*, in holding that the statute meant only that the parties should be in the same position with reference to the *undecided issues* in the case, then the force of the statutes, as a basis for the decisions referred to, is swept away, and the courts of those states may, in effect, be ranked with those so holding, without the aid of a statute. With that view of the case it might well be held, as in the case last referred to, that the statute gave no authority for the decision.

So far as the provision of the constitution of the United

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States may be invoked, we take it as pretty well settled now that that provision governs the courts existing by virtue of the laws of the United States, and has no application to the state courts. *United States v. Keen*, 1 McLean, 438. *Baron v. Baltimore*, 7 Peters, 243. *Switchell v. Commonwealth*, 7 Wall., 321. *State v. Wells*, 46 Iowa, 662. *Fox v. Ohio*, 5 Howard (46 U. S.), 410. We hold, therefore, that the plaintiff in error was properly put on trial for murder in the first degree; the granting of a new trial having the effect of setting aside all the results of the former trial.

It is next contended that the court erred in overruling the challenge of plaintiff in error to a juror, J. W. B. McAllister, for cause. The examination of this juror was quite extended by counsel on both sides, as well as by the court, and it could serve no good purpose to transfer it to this already lengthy opinion. It is sufficient to say that if the juror had formed an opinion as to the guilt or innocence of plaintiff in error, it was solely upon reading newspaper reports published at the time of the homicide, of the truth or falsity of which he had no opinion, and upon which he seemed to base whatever opinions he had, if any existed. The opinion of the juror was clearly a hypothetical one and could in no way disqualify him. *Curry v. State*, 5 Neb., 415. *Murphy v. State*, 15 Id., 385. The examination made it clear that the juror did not desire to sit in the case and would have been pleased if excused. Yet his answers were doubtless conscientiously given. During the examination by the court he was asked if, notwithstanding what he had heard and read, he could sit as a fair and impartial juror and render a verdict according to the law and evidence. His answer was, "I shall have to answer as I did Judge Mason. I don't know enough to swear I could not."

The Court. "I ask you if, sitting as a juror in this case, you could render a verdict according to the law and evidence as it shall be given you on the trial of the case."

Answer. Well, sir, I guess that I could, I don't know. I am very sorry I have been brought into this case in some way. I am sorry I am troubled in this way. At the same time I would not like to have to reply—to swear. I don't know enough to say. I cannot tell. The newspapers—

The Court. How?

A. I don't know anything further except what I read, and I didn't form an opinion, as I know, as to whether they were right. We take the Omaha *Herald* and Lincoln papers, and local papers, and I don't know whether they were right or wrong; that's as far as I can tell you.

* * *

The Court. You have no impression as to whether he is guilty or not of the crime?

A. Yes, necessarily some impression, or it would not have been in the newspaper.

The Court. You have an impression a man was killed?

A. Yes, I have an impression a man was killed.

The Court. You have an impression a man killed him?

A. Yes.

The Court. Whether or not it was excusable, you have no impression?

A. No.

The Court. Then it would not take evidence to remove that?

A. No, it would not."

While the examination of the juror was, at times, not very clear, yet on the whole examination he shows himself to be competent, and the court did not err in retaining him.

The next and last error complained of is the alleged misconduct of counsel for the state while making the closing argument. This alleged misconduct consists in going outside the record, and referring to the Cincinnati riots

which had occurred a few days before the trial. The record discloses the fact that counsel for plaintiff in error had to some extent gone outside of the evidence in his very able argument to the jury, and that the allusion to the Cincinnati riots by the state's counsel was in reply to what had been previously said, and for the purpose, as stated, of illustration. While counsel for the state, especially, should at all times avoid going outside of the record, and while, in a case of this importance especially, we should be in favor of a strict enforcement of the proper rules governing arguments to juries, yet it is impossible for us, in the light of the almost uniform decisions of this court, to say the trial court erred in the matter referred to. We are informed by the record that during the argument of Mr. Watson, when he referred to the Cincinnati riots, the attorney for plaintiff in error said, "I desire to object to the discussion of the Cincinnati riots."

Watson: "I simply refer to it in illustration. I heard counsel state worse."

The Court. "It is not—."

Mason. "Note an exception."

There was no ruling of the district court adverse to plaintiff in error or otherwise. In *Bradshaw v. The State*, 17 Neb., 147, a similar question was before this court, and it was held that "before a case can be reversed and a new trial ordered, it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this state is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language, and a ruling had upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument an exception to the decision can be noted." There being no ruling of the court we can not say the court erred. The

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question did not afterwards arise, as the line of argument objected to was abandoned.

We find no error in this record. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	80
19	677
23	504
24	309

18	80
37	390

18	80
58	17

18	80
159	175

18	80
662	380

L. D. HUNTER, PLAINTIFF IN ERROR, V. JAMES LEAHY & Co., DEFENDANT IN ERROR.

1. **Revivor: LIMITATION.** The limitation of one year within which an action may be revived on motion does not apply to the revival of a judgment.
2. **JURISDICTION OF COUNTY COURT.** A county court upon proper application may revive a judgment which has become dormant.

ERROR to the district court for Cass county. Tried below before POUND, J.

J. H. Haldeman, for plaintiff in error, cited: Sections 466-472, and 473, Civil Code. *Seymour v. Street*, 5 Neb., 85. *Freeman Judgments*, § 442. *Scroggs v. Tutt*, 23 Kan., 181. *Angell v. Martin*, 24 Id., 334. *Baker v. Hammer*, 31 Id., 325. *Gillette v. Morrison*, 7 Neb., 263. *Carter v. Jennings*, 24 Ohio State, 188. Civil Code, § 1047. *Freeman Executions*, 29, 30.

R. B. Windham, for defendant in error, cited: *Wright v. Sweet*, 10 Neb., 190. 2 Nash Pl. & Pr., § 417. *Tyler v. Winslow*, 15 Ohio State, 364.

MAXWELL, J.

In September, 1874, the defendant in error recovered a judgment against the plaintiff, in the probate court of Cass

county, for the sum of \$171.35 and costs. In December, 1875, an execution was issued on said judgment, and delivered to the sheriff, but by the direction of the attorney for the defendant in error was returned without making a levy. In September, 1876, an execution was again issued and delivered to the sheriff, and again returned without making a levy. In March, 1884, the attorney for the defendant herein filed a motion in said court to revive said judgment, and in May thereafter an order of revivor was entered, and the action revived. The case was taken on error to the district court where the judgment of the county court was affirmed.

It is claimed by the plaintiff in error that the right to revive is barred by the statute of limitations.

Sec. 466 of the Code provides that "an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor unless in one year from the time it could have been first made."

The mode of reviving actions by motion is not exclusive. A party may, after the expiration of a year, revive an action by bill or supplemental petition. *Carter v. Jennings*, 24 Ohio State, 188. *Fox v. Abbott*, 12 Neb., 328. *Pendleton v. Fay*, 3 Paige, 204. 2 Daniels Ch. Pr. (4 Ed.), 1509. Maxwell Pl. and Pr. (3 Ed.), 695.

Sec. 473 of the Code provides that if a judgment becomes dormant it may be revived in the same manner as is prescribed for reviving actions before judgment.

The statute does not provide that the judgment is to be revived in one year from the time it becomes dormant or the right to revive will be barred, and we have no authority to insert words to that effect therein. We do not think the restriction as to time applies to the revivor of judgments. The court no doubt might refuse to revive a judgment which had remained dormant for so long a time as to raise a presumption of payment, and where it would

be inequitable to enforce it. But that question is not before the court. The question here involved was before this court in *Wright v. Sweet*, 10 Neb., 190, and an order reviving a judgment sustained.

Objections were made to the right of a county court to make an order of revivor.

In *Miller v. Curry*, 17 Neb., 321, it was held that the provisions of the Code for the revival of actions and judgments apply to actions before justices of the peace. The same procedure applies to county courts. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18 82
21 874
18 82
28 398

REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF
IN ERROR, v. LOUIS FINK, DEFENDANT IN ERROR.

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1. **Railroad: EXERCISE OF POWER OF EMINENT DOMAIN: DAMAGES.** While the statute authorizes a railroad corporation to go upon the land of an individual, if need be, and locate its line of road over such land, and permits either the corporation or the land-owner to institute proceedings to condemn the right of way, yet, before the corporation can appropriate such right of way by entering upon the land and constructing its road across the same, the damages must have been appraised and the amount thereof paid to the land-owner or deposited with the county judge. *O. & N. W. R. R. v. Menk*, 4 Neb., 21. *Ray v. A. & N. R. R.*, 439. If the damages are not awarded and deposited the corporation is liable in trespass.
2. ———: ———: **HOW FAR STATUTE EXCLUSIVE.** The statutory mode of acquiring the right of way and ascertaining the damages therefor is exclusive as to the manner of assessing the value of the land taken with damages to the residue of the tract, but does not include damages to the possession caused by the wrongful entry upon the land before condemnation.
3. ———: ———: **MEASURE OF DAMAGES.** The measure of damages in such case does not, before the award of the commissioners, include the value of the land taken.

ERROR to the district court for Gage county. Tried below before BROADY, J.

L. W. Colby, T. M. Marquett, and J. W. Deweese, for plaintiff in error, cited: *Stowell & Flagg*, 11 Mass., 363. *Calkin v. Baldwin*, 4 Wend., 667. 1 Redfield Railways, 334. *Mason v. R. R.*, 31 Me., 215. *Aldrich v. R. R.*, 1 Am. Ry. Cases, 206. Mills Eminent Domain, §§ 88, 89. *Hanlin v. R. R.*, 21 N. W. R., 623. *Sherman v. R. R.*, 40 Wis., 645. *R. R. v. Benitos*, 10 Am. & Eng. R. R. Cases, 122.

Phil. E. Winter and Babcock & Davidson, for defendant in error, cited: 2 Coke Inst., 200. *Aling v. Harris*, 5 Johns., 175. *Scidmore v. Smith*, 13 Id., 322. *Doe v. R. R.*, 1 Ga., 524. *Clark v. Brown*, 18 Wend., 220. *Keith v. Tilford*, 12 Neb., 271. Wade Notice, § 1127. *Horbeck v. Toledo*, 11 Ohio State, 219. *Lohmann v. R. R.*, 18 Minn., 174. *Graves v. Otis*, 2 Hill, 468, and note *A. Mohawk R. R. v. Archer*, 6 Paige, 84. *Oregon R. R. v. Oregon Nav. Co.*, 3 Oregon, 178. *Loop v. Chamberlain*, 20 Wis., 135. *Omaha R. R. v. Menk*, 4 Neb., 21.

MAXWELL, J.

This is an action brought by the defendant in error against the plaintiff to recover damages for injury to certain real estate of the defendant during the years 1880, 1881, and 1882. The cause of action is stated as follows: "That the defendant (plaintiff in error) during the years A. D. 1880, 1881, and 1882, did unlawfully and with force and arms, break, enter, occupy, and ever since has occupied a portion of the close of plaintiff heretofore described, and then and there dug, excavated, removed, and piled up the soil and earth of the plaintiff, and then and there built and laid their line of railroad which they have

ever since operated, thereby converting to their own use four and eleven-one-hundredths acres of land out of the south-east corner of the aforesaid described piece or parcel of land (the s. e. $\frac{1}{4}$ of Sec. 25, t. 2 n., r. 6 e.) whereby the plaintiff for and during all that time lost and was deprived of the use and benefit of said four and eleven-one-hundredths acres of land, all of which is to the damage of the plaintiff in the sum of one thousand dollars."

The defendant below (plaintiff in error), in its answer, alleges that, "2d, in the years 1880, 1881, the defendant located and constructed its line of railroad over and across a portion of the said described real estate, by building and constructing a road-bed and track for its line of road; that defendant took possession of the strip of ground necessary for the right of way and location of said road peaceably and quietly, and without any objection or protest on the part of the plaintiff; and the defendant has ever since occupied the same for right of way for its road track in the usual course of its business as a public carrier. * * *

3d. "That it (the defendant below) built and constructed its line of road into and through a portion of Gage county in the year 1880 and 1881, and that prior to the location and construction of the same the said defendant purchased and condemned the right of way for its line of road; that prior to its construction the defendant needed and desired a portion of the plaintiff's said land for right of way, and tried to agree with plaintiff upon the amount of damage to be paid for said right of way, but the plaintiff and defendant failing to agree upon the amount of damages to be paid, the defendant proceeded, as by statute provided, and prior to the construction of said track, to condemn the right of way over the said land," etc.

The reply is a general denial.

On the trial of the cause the jury returned a verdict in favor of the plaintiff below for the sum of \$500, upon which judgment was rendered.

It is claimed by the attorneys for the plaintiff in error that as the statute gives the right to either party to institute proceedings to condemn real estate for a railway, that, therefore, the statutory remedy is exclusive, and an action of trespass will not lie. Sec. 97 of Ch. 16, Comp. Stat., entitled "Corporations," provides that "if the owner of any real estate over which said railroad corporation may desire to locate their road shall refuse to grant the right of way through his or her premises, the probate judge of the county in which such real estate may be situated, as provided in this subdivision, shall, upon the application of either party, direct the sheriff of the county to summon six disinterested freeholders of said county, to be selected by said probate judge, and not interested in a like question, unless a smaller number shall be agreed upon by the parties, whose duty it shall be to inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land to the use of said railroad corporation," etc.

Sec. 100 provides that, "If upon the location of said railroad it shall be found to run through the lands of any non-resident owner, the said corporation may give four weeks' notice to such proprietor, if known, and if not known, by a description of said real estate by publication four consecutive weeks in some newspaper published in the county where such lands lie," etc., * * * "and upon payment of the damages assessed to the probate judge of the proper county for such owner, the corporation shall acquire all rights and privileges mentioned in this subdivision."

By Sec. 97 it is provided, "that either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within sixty days after such assessment. And in case of such appeal the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified, to

the county clerk, to be filed and recorded as hereinbefore provided in his office. But such appeal shall not delay the prosecution of the work on said railroad, if such corporation shall first pay or deposit with said probate judge the amount so awarded by said freeholders."

Sec. 21 of Art. 1 of the constitution provides that, "the property of no person shall be taken or damaged for public use without just compensation therefor."

Our statute, in effect, provides that a railroad company may, if need be, go upon land not belonging to it and locate its line over it, but, before it appropriates the land to its own use, it must pay to the land-owner or deposit with the county judge for his use the amount of the award made by the commissioners. The proceedings to condemn may be instituted by either the land-owner or the corporation, but the award must be made and the money paid or deposited before the corporation has any legal right to appropriate the property. *Menk v. O. & N. W. R. R.*, 4 Neb., 21. *Ray v. A. & N. R. R.*, 4 Neb., 439. If this is not done, an action for injury to the possession will lie, because the corporation has no legal right to occupy the premises. Payment for the property appropriated must precede, or at least be concurrent with, the appropriation of the property. The statute, while it authorizes the corporation to condemn such property as it may require for the construction of its road, protects the citizen as well, by requiring just compensation to be made therefor. The law does not require the citizen to institute proceedings to protect his rights, but merely permits him to do so. Constitutional guarantees of the rights of property would be of very little value if a corporation could seize the property of an individual and say to the owner, if you want compensation for this property institute proceedings to condemn it, and after we think the proper amount is awarded we will pay you. Where the assent of the owner is not obtained the corporation must pay the condemnation money before it acquires the right to construct

its road across the land of another. In other words, the property of a citizen cannot be appropriated for public use until the condemnation money is deposited with the county judge, for the use of the owner. This money presumably represents the damages which the land-owner has sustained by the location of the road across his premises. If the sum awarded is insufficient or in excess of the actual injury sustained, either party may appeal to the district court, where the question of damages will be tried *de novo*. But the appeal does not excuse the failure to deposit the amount of the award. *Ray v. A. & N. R. R.*, 4 Neb., 439. Thus, in the case cited, the Burlington & Southwestern R. R. Co. condemned the right of way across the plaintiff's land, but made no payment or deposit of the award. The company then appealed from the award of the commissioners to the district court, where judgment was rendered against it. It afterwards assigned all its rights to the A. & N. R. R. Co., which seemed to claim as an innocent purchaser, but this court held that the assignee took no greater interest than was possessed by the assignors, and that the money not being paid or deposited, the owner of the land had his choice of three remedies, viz.: "He could bring an action for the award, sue for damages occasioned by the trespass, or enjoin the operating of the road across his premises until the award should be paid." That opinion was rendered nearly ten years ago, and has never, so far as the writer is advised, been questioned, certainly not in this court, and it is the law of this state. The corporation must see to it, therefore, before it enters upon the land of another to construct its road, that it has so far complied with the statute as to possess the authority. If it has not, it is like any other trespasser liable in damages. This principle is recognized by the corporation in its answer, in which it alleges "that the damages sustained by the plaintiff for the location and construction of said road over and across his said land were duly assessed and awarded by a commission duly

appointed by the county judge of said county, in all respects as provided by statute; and the amount of damages thus awarded was deposited with the county judge for the plaintiff by the defendant, and which remains on deposit for the plaintiff, if he has not withdrawn the same." As the proof fails to establish the truth of the answer in this regard, it need not further be considered. In an action for trespass, however, the corporation will only be liable for such damages as result from the wrongful appropriation. The value of the land must be ascertained in the mode pointed out in the statute. The court instructed the jury "that should you believe from the evidence that the plaintiff was the owner of the land described in his petition at the time of the several wrongs therein complained of, and should you further believe from the evidence that said land has been injured by reason of the building of defendant's line of road across the same, then the plaintiff is entitled to recover of the defendant the difference between what would have been the value of his land at the time of the injury complained of had the defendant not have constructed their line of road across the same, and what it was worth at that time with it constructed, in the manner as shown by the evidence."

This action is brought by the plaintiff below to recover damages sustained by him for injuries to *his* land. The corporation does not acquire an easement in the right of way by the verdict in this case; that can only be done by condemnation proceedings. The measure of damages, therefore, as stated in the above instructions, is incorrect, and must have been prejudicial. Until the land is condemned and the damages paid the corporation is a trespasser and is liable for the actual injury sustained, but that does not include the value of the land taken. The condemnation proceedings are shown to have been nugatory, by reason of the failure to serve the defendant in error, who was a non-resident of the state, with notice. They afford no justification, therefore, to the action.

R. V. R. R. Co. v. Fink.

There are other assignments of error to which it is unnecessary to refer. For the error in giving the instruction complained of, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF
IN ERROR, V. LOUIS FINK, DEFENDANT IN ERROR.

SAME V. MARY E. WYKOFF.

1. **Instructions to Jury.** Where objection is made that the instructions of the court to the jury are not sufficiently explicit, the remedy is to request instructions which are satisfactory. *B. & M. R. R. Co. v. Schluntz*, 14 Neb., 425. *S. C. R. R. Co. v. Brown*, 13 Id., 317.
2. **Negligence: DAMAGES.** An instruction that if the defendant's "negligence contributed in a large degree, along with the act of God, in causing the loss sustained by the plaintiff, it (the defendant) would be liable in damages for the additional damages sustained by the plaintiff by reason of such negligence of the defendant," is not erroneous.
3. — : **ANSWER: EVIDENCE CONFLICTING AS TO DAMAGES MUST BE SUBMITTED TO JURY.** Where the answer is a general denial, and the witnesses disagree as to the amount of damages, an instruction that "the question of amount of damages scarcely requires much attention, since in the trial the defendant has made no contest thereon," is erroneous.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Marquett & Deweese, for plaintiff in error, cited: *B. & O. R. R. v. Sulphur Springs*, 2 Am. & Eng. R. R. Cases,

166. *Billinger v. N. Y. R. R. Co.*, 23 N. Y., 51. *R. R. Co. v. Steven*, 73 Ind., 278. *Drake v. R. R.*, 17 Am. & Eng. R. R. Cases, 59. *Chase v. N. Y. R. R. Co.*, 24 Barb., 273.

J. E. Bush and P. E. Winter, for defendant in error, cited: *Gordan v. Buchanan*, 5 Yerg., 72. *Friend v. Wood*, 6 Gratt., 184. *Michaels v. R. R.*, 30 N. Y., 571. *McArther v. Sears*, 21 Wend., 190. *Cooley Torts*, 640. *McMahon v. Davidson*, 12 Minn., 357. *C. R. I. & P. R. R. v. Moffit*, 75 Ill., 524. *Clark v. Lebanon*, 63 Me., 393. *Simpson v. Kimbertin*, 12 Kan., 355.

MAXWELL, J.

These actions were brought against the railroad company in the district court of Gage county by the defendants in error to recover damages sustained by them by reason of the overflow of water along Indian creek in said county, caused, it is alleged, by the improper construction of the railroad along and across said creek. As the cases are of the same nature, and substantially grow out of the same cause of action, the parties on the trial entered into a stipulation that both causes be submitted at the same time to the same jury, which, in case they found the railroad company liable, were to return separate verdicts in favor of the defendants in error (plaintiffs below).

In the Fink case the jury returned a verdict for the sum of \$586.74, and in the Wykoff case for \$491.00. A motion for a new trial having been overruled, judgment was entered on the verdicts. The railroad company bring the causes into this court on error.

Fink alleges in his petition that, during the years 1880 and 1881 he was the owner of certain real estate (describing it) in Gage county; that in the years 1880 and 1881 the railroad company "constructed and run its line of railroad aforesaid over, across, and through a certain

tract of land contiguous to the land of the plaintiff above described." "That in constructing said line of railroad over the said land last above described, the same being contiguous to the lands of the plaintiff, the defendant negligently built and constructed a bridge over a natural water-course, known as Indian creek, in such a manner as to obstruct the natural flow of water in the channel of said creek, wheretoforesaid it had and of right ought to flow unobstructed, by catching hold and piling up great masses of driftwood and debris." "That eastward from said bridge across said Indian creek the defendant built and constructed an embankment of great height, extending eastward from said bridge to a great length, and across certain other water-courses, wholly neglecting and failing to put in, build, and erect or construct proper and sufficient bridges, culverts, or sluiceways for the water to pass through or under said embankment." That "by reason of said improperly constructed bridges, and the erection of said embankment across said water-courses without proper and adequate bridges, culverts, or sluiceways, the natural water-courses were dammed up and the water was held and backed up until it had gained such volume and force as to break through said embankment erected as aforesaid by the defendant. And on or about the 11th day of June said water broke through said embankment and flowed over the land of the plaintiff herein described, with great force and volume, destroying the grain of the plaintiff growing on said land, and washing away the soil from the land of the said plaintiff," to his damage in the sum of \$1,500, etc.

The railroad company in its answer denies all the allegations of the petition, except that it is a corporation, and pleads that it had condemned the right of way over the plaintiff's and adjoining lands, and deposited the money with the county judge of said county, "and that the defendant's line of road constructed thereon has since been maintained and operated on said right of way thus acquired in a legal and proper manner."

In the Wykoff case the plaintiff below claims damages by reason of an ice gorge formed at the bridge in question in March, 1881, by which her orchard was greatly injured and quantities of corn and hay destroyed; also for injuries sustained by the flood in June of that year. A very large amount of testimony was introduced on the trial in which the witnesses substantially agree that the storm was very severe, and some of them state that it was the most severe ever known since the settlement of the county. Others, however, deny this. There is no doubt whatever that the storm was one of the most severe that had ever visited that locality.

The principal defense against liability of the railroad company is, that the storm was unusual—no such flood of water had been seen before that time by the oldest inhabitant of the county, and that the evidence of experts and persons familiar with the construction of railroads shows that the railroad was constructed in the ordinary manner of constructing railroads in this country, and that the bridges and culverts were sufficient judging from the experience of the past. *O. & R. V. R. R. Co. v. Brown*, 14 Neb., 173. The questions involved were questions of fact, and proper for the jury to pass upon; and as the court permitted the jury to view the property which is the subject of litigation, it is pretty clear that there was very important evidence before the jury which is not before this court. It is impossible, therefore, for this court to review the facts.

Objection is made that the "instructions of the court to the jury are in general terms, and give no correct guide to the jury in determining what obstruction would be allowable in the proper construction of bridges and embankments."

In a number of cases this court has held that instructions must be based on the evidence. *Meredith v. Kenard*, 1 Neb., 319. *City of Crete v. Childs*, 11 Id., 257.

Neihardt v. Kilmer, 12 Id., 38. And they should be clear and explicit and cover all questions at issue. *Milton v. State*, 6 Neb., 144. *Parrish v. State*, 14 Id., 62. The complaint in this case, however, is not that the instructions were not based on the evidence, but that they are not sufficiently explicit. The remedy in such case is by request for instructions which are satisfactory. *B. & M. R. R. v. Schluntz*, 14 Neb., 425. *S. C. R. R. Co. v. Brown*, 13 Id., 317. As we find no request to the court for instructions of the character named, and refusal to give the same, the objection is unavailing.

Complaint is made of the fourth instruction given on behalf of the plaintiff below, which is as follows: "The court instructs the jury that it is not necessary to the plaintiff's recovery to show great negligence on the part of the defendant; and if you believe from the evidence that the defendant negligently constructed its line of road, bridges, and culverts, as complained of by the plaintiff in her petition, and such negligence contributed in a large degree, along with the act of God, in causing the loss sustained by the plaintiff, it would be liable in damages for the additional damages sustained by the plaintiff by reason of any such negligence of the defendant."

A loss occasioned by the act of God has reference to acts with which the agency of man has nothing to do. *McArthur v. Sears*, 21 Wend., 190. *Gordon v. Buchanan*, 5 Yerg., 72. *New Brunswick, etc., Co. v. Tiers*, 24 N. J. Law, 697. *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y., 564. This question was very ably discussed by Cowen, J., in *McArthur v. Sears*, 21 Wend., 195-200, and a large number of authorities cited. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God. *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y., 564-571. *Proprietors, etc., v. Wood*, 4 Doug., 287-290. *Chicago, etc., R. R. Co. v. Sawyer*, 69 Ill., 285. The instruction, therefore, was favorable to the railroad com-

Dunbar v. Briggs.

pany, and it has no cause of complaint because it was given.

The court gave the following instruction, to which exceptions were taken: "The question of amount of damages scarcely requires much attention, since in the trial the defendant has made no contest thereon." If there was no conflict in the testimony as to the amount of damages, such an instruction perhaps would not be erroneous. But, where, as in this case, the witnesses do not agree, the instruction must have been prejudicial. The railroad company in its answer, among other things, denies the damages, and it devolves upon the plaintiff to prove the same, and the facts must be submitted to the jury to determine. As this was not done in this case the judgment must be reversed. Objections are made to some of the other instructions, but we see no error in them, and they need not be noticed. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

18	94
30	550
18	94
38	888

JOHN J. DUNBAR, PLAINTIFF IN ERROR, v. B. B. BRIGGS,
DEFENDANT IN ERROR.

1. **Trial: THREE TRIALS: VERDICT SUSTAINED.** When a case has been tried three times, the verdict of the jury each time being in favor of the plaintiff, the court will not set aside the third verdict as being against the weight of evidence, unless it is clearly wrong.
2. **Instructions given set out in the opinion, Held, Not erroneous.**

ERROR to the district court for Johnson county. Tried below before DAVIDSON, J.

A. H. Babcock and A. Hardy, for plaintiff in error, cited: *City of Crete v. Childs*, 11 Neb., 256.

J. E. Bush and Hurley & Crane, for defendant in error, cited: *Bryant v. R. R. Co.*, 63 Iowa, 465. *Chittenden v. Evans*, 48 Ill., 52.

MAXWELL, J.

This cause was before this court in 1882, and is reported in 13 Neb., 332, the judgment of the court below being reversed and the cause remanded. After the cause was remanded application was made to the district court to change the place of trial, and the cause was thereupon transferred to Johnson county, and a trial had, which resulted in a verdict and judgment for the defendant in error.

The action is brought upon a promissory note, of which the following is a copy: "\$900.00. Beatrice, Neb., July 28, 1879. Sixty days after date I promise to pay to order of B. B. Briggs, nine hundred dollars, at the office of Smith Bros., Bankers. Value received. John J. Dunbar." The defendant below (plaintiff in error) in his answer admits the making of the note, but alleges that it was given for the purchase price of thirty-seven Texas horses and mares; that Briggs warranted them to be sound and free from disease, and that the defendant purchased the same on the faith of the warranty; that all of said horses were diseased at the time of said purchase with a disease known as Texas itch, which fact was wholly unknown to the defendant; that the defendant, relying upon the warranty, turned said Texas horses in with his herd containing more than one hundred horses, and the Texas horses being affected with said disease communicated the same to the entire herd; that all the horses purchased from the plaintiff died with said disease and about sixty-five head of the other horses in said herd. The defendant

therefore prays for judgment on his counter-claim for the sum of \$30,000.00. The reply is a general denial.

The first error relied on is, that the verdict is not sustained by sufficient evidence and is contrary to law, and the second, third, and fourth assignments are to the same effect, and will be considered with the first.

It may be conceded that the testimony shows that Briggs warranted the horses to be sound; and in our opinion the clear weight of the evidence shows that they were sound at the time of the sale to Dunbar. The sale was made the latter part of July, 1879, and it is pretty clear that none of the horses in question were affected with the disease until two or three months afterwards. The witnesses disagree as to the exact time, and it is not material in this case except as showing that the horses were not diseased when Dunbar purchased them.

The plaintiff below not only introduced evidence tending to prove that the horses were sound when sold to the defendant, but went further, and introduced testimony tending to prove that the horses in controversy caught the disease from another herd about three months after the purchase. This testimony was not introduced in the former trial and it tends to make clear an otherwise doubtful point in the case, and justified the jury, in connection with other evidence in finding, as they must have done, that the horses were sound when Dunbar bought them.

The fifth objection is overruling certain objections to interrogatories in depositions. Without noticing them at length, there was no such prejudice to the defendant as would justify the reversal of the case.

The defendant asked the court to give the following instruction :

"If it is true that Briggs himself, and also several witnesses for him, who had in various ways been connected with the herd for him, neither knew or had observed that the horses were diseased—this cannot prevail against

the positive testimony of several unimpeached and not otherwise contradicted witnesses, who swear positively that they saw the signs of this disease, known as the 'Texas itch' in Briggs' herd before the delivery of the ponies out of the herd to Dunbar, and among the ponies delivered to Dunbar out of this herd, within a time less than it takes to start and develop these signs."

The court modified it as follows: "If it is true that Briggs himself, and also several witnesses for him, who had in various ways been connected with the herd, neither knew nor had observed that the horses sold said Dunbar were diseased, yet if you are satisfied from the evidence that said horses were, at the time of said sale, in fact infected with said disease known as the 'Texas itch,' this will be sufficient to show a breach of the warranty of the soundness of said horses; if you believe from the evidence there was in fact any such warranty made by said Briggs as claimed by said defendant."

The instruction as given evidently is correct, and the modification was properly made.

In conclusion the court instructed the jury that "the burden is on the defendant to make out his defense or counter-claim by a preponderance of the proofs." This was repeated in another form. The court then added: "But if defendant has established by a fair preponderance of the testimony the defense and counter-claim set up in his answer, then you will find for the defendant and assess his damages at such sum as the testimony shows him entitled to over and above the amount of said note, in the light of the foregoing instruction."

While all that is required is a preponderance of the evidence to establish either a claim or a counter-claim, yet we do not think the use of the word "fair" in the connection in which it is used, particularly when the rule had been correctly stated in the same connection, was prejudicial.

Guthman v. Guthman.

This case has been submitted to three juries with the same result, a verdict in favor of the plaintiff below. Under such circumstances, to justify the court in reversing the judgment as being against the weight of evidence, it must be clearly wrong, or there must have been such error in giving or refusing instructions as was palpably prejudicial to the rights of the party complaining. As we find no substantial error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	98
26	361
18	98
45	782

FRANK R. GUTHMAN, PLAINTIFF IN ERROR, v. MARY J. GUTHMAN, DEFENDANT IN ERROR.

1. **Dower:** COURT MAY ASSIGN. When a widow is entitled to dower in the lands of which her husband died seized, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever county the lands may lie, by the county court of the county in which the estate of the husband is settled, upon the application of the widow.
2. ———: ———: PRACTICE. In order to oust the county court of such jurisdiction the right of the applicant to such dower must be disputed by presenting an issue of fact, which, if established by proof, would defeat her claim of dower, and such issue must be one which the county court by its organization is unable to try.
3. **Homestead:** COUNTY COURT MAY ASSIGN. A county court has jurisdiction to set aside a homestead to a widow by virtue of its general jurisdiction in matters of probate and the settlement of estates.

NOTE.—County court has exclusive jurisdiction in probating wills. *Loosemore v. Smith*, 12 Neb., 343. *Pettit v. Black*, 13 Id., 152. Homestead rights of wife. *McMahon v. Speilman*, 15 Neb., 654. *Dickman v. Birkhauser*, 16 Id., 686. *Stout v. Rapp*, 17 Id., 462. *McHugh v. Smiley*, Id., 626.—REP.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

M. A. Hartigan, for plaintiff in error.

L. C. Burr, for defendant in error.

COBB, CH. J.

Mary J. Guthman filed her petition in the county court of Lancaster county, alleging that she is the surviving widow of Charles Guthman, deceased; that said Charles Guthman departed this life on or about the 19th day of January, 1882, leaving him surviving as sole heir, his daughter Minnie Ellen, a minor of about the age of thirteen years, and that Joseph V. Weckback, Frank Guthman, and William Guthman, are her duly authorized guardians. That said Charles Guthman died seized in his own right of certain lands located in said county of Lancaster, describing the same, which said premises during the life-time of said Charles Guthman constituted his homestead and was occupied as such by himself and her, the said petitioner, his wife, for some time prior to and at the time of the decease of the said Charles Guthman; that said Charles Guthman left a will of which the said Frank Guthman and Joseph V. Weckback are the duly authorized executors. She further alleged that in his said last will and testament the said Charles Guthman made a certain provision for her, the said petitioner, to accept in lieu of dower, but that she refuses to accept the provision in said will mentioned in her behalf, and brings this her action for the admeasurement, adjustment, and assignment of her dower rights in said real estate as by the statutes of the state she is entitled to have. She further alleged that she desires and elects to have that portion of said lands on which the house, home, or manor house, and out-buildings

on said premises adjacent thereto are situated, and so much additional thereto of said lands as by the statutes of the state she is entitled to have, so that the same may be contiguous and convenient for farming purposes, and be set off separate and apart from the remaining lands, and petitioner can have exclusive possession and use thereof during her life-time, etc.


In response to said petition the said Minnie Ellen Guthman, by her guardians, and the said guardians by counsel, appeared in the said county court and filed an answer, of which the following is a copy:

1. "Now comes Minnie Ellen Guthman, by her guardians, F. R. Guthman, Joseph V. Weckback, and William Guthman, who appearing in that behalf, and for no other, and interpose this their answer and plea in abatement, and deny and challenge the jurisdiction of the court to apportion any homestead rights or dower rights of any person interested in the lands or estate of said deceased Chas. Guthman. 2d. Denying all other allegations in said petition contained."

Upon the hearing the county court made and entered the following findings and judgment in the said proceeding, to-wit: "I find that the prayer of said petitioner ought to be and is hereby granted. I further find that the said petitioner is the widow of said Charles Guthman, deceased, and is therefore entitled to the exclusive use, occupancy, rents, and profits of, in, and to the following described lands, to-wit: The north-west quarter of section nine, range 8 (*sic*) east of the sixth principal meridian in Lancaster county. That said land was the homestead of the deceased, and was occupied by said deceased and said petitioner as their homestead at the time of the death of said decedent, and that the petitioner is entitled to a life estate in the same, and is entitled to have the same appraised and set apart and assigned to her, or so much thereof as shall not exceed in value the sum of two thousand dollars, nor in

extent one hundred and sixty acres. I further find that she is entitled to and is hereby allowed her dower in all of the remaining lands of which her said husband died seized, to-wit: The north half of section nine, in township nine north, of range eight east of the sixth principal meridian in Lancaster county, containing about three hundred and twenty acres, less the homestead above described. Also the north-east quarter of the north-east quarter of section eight in township nine north, of range eight, containing about forty acres, all in Lancaster county. It is therefore by me considered, ordered, and adjudged that the prayer of said petition be and the same is hereby allowed, and it is further ordered that the said petitioner have her life estate in said homestead, to-wit: the north-west quarter of section nine in township nine, range eight, appraised, set apart, and assigned to her separate use for her life estate, or so much thereof as shall not exceed in value the sum of two thousand dollars, nor in extent one hundred and sixty acres, constituting such part of said lands upon which the house and other buildings are situated; and is further ordered that said petitioner have appraised and set off for her separate use and benefit her dower or life estate in the remainder of her deceased husband's lands as above described, set apart for her use and benefit during her natural life, and that said lands be set aside by metes and bounds, and that they be set apart in a body and contiguous to the residence part of said lands or the part where the buildings and other improvements now are," etc.

There was an appeal taken to the district court by the heir at law and executors of the will of the deceased. In said last mentioned court the petitioner filed substantially the same petition as that filed by her in the county court as above stated. To which the respondents made answer, in which they admitted the death of said deceased, the survivorship of his said heir and the appointment of said



executors; also that said deceased was seized of the real estate described in the petition. They deny each and every allegation of the petition not expressly admitted. They allege that the petitioner is not the head of a family, etc. That the said Minnie Ellen Guthman was the child of the deceased by his first wife, and that the custody of said child was removed and willed from petitioner, etc.

- They further answering say, that "They have at all times been ready and willing that petitioner might have and receive her dower right in the estate of deceased, but charge the truth and fact to be that she sought to dismantle said estate by first claiming a homestead from said estate to the extent of one hundred and sixty acres, and to have then allotted a dower estate from the balance remaining, which was done in the county court of Lancaster county, and from which order and decree these respondents appeal and ask that the same, so far as homestead admeasurement or dower admeasurement is concerned, be vacated and held for naught, said court having no jurisdiction or power to make any such order and decree. They further allege that said petitioner has joined in a lease with these respondents for the leasing of said premises for the term of three years, and with an option of a longer period. That she has received a large amount of personal estate of the value of three thousand dollars and upwards, and has appropriated the same to her personal use in no way or manner placing any portion to the care, comfort, or education of said child," etc.

Upon the trial the district court made and rendered the following findings and judgment, to-wit:

"On due consideration of the premises the court doth find that the petitioner, Mary J. Guthman, widow of Chas. Guthman, deceased, is entitled to dower in the real estate described in the petition, and that the same should be assigned and set off to her in the manner provided by law And the court doth further find, that said Mary J. Guth-

man is not entitled to have a homestead assigned and set off to her in this proceeding, on the ground that this court has no jurisdiction; this proceeding being appealed from the county court of Lancaster county, and the right to such homestead being contested, the county court had no jurisdiction to assign and set off such homestead.

"It is therefore by the court considered, adjudged, and decreed that the proceedings and judgment and findings of the county court of Lancaster county, in so far as the same sets apart and assigns dower to the said Mary J. Guthman in the premises described in the petition, be and the same is hereby ratified and confirmed, and that said Mary J. Guthman, widow of said Charles Guthman, deceased, is entitled to such dower.

"It is further considered and adjudged that the proceedings, finding, and judgment of the county court aforesaid, in so far as the same attempts to set apart and assign a homestead interest to the said Mary J. Guthman in and to the real estate in controversy, be and the same is hereby vacated, set aside, and held for naught, and that the said Mary J. Guthman is not entitled to such homestead for want of jurisdiction of this court, and said county court in this proceeding, the same being appealed from said county court as aforesaid, and the said homestead interest in the real estate in controversy being contested in said county court."

The respective parties having severally excepted to the said findings and judgment so far as the same was against each respectively, and each having severally moved for a new trial, and the same being denied, the cause is brought to this court on error by both sides, respectively.

There is but one question raised by the pleadings, and one in addition by the judgment of the district court.

First, as to the question of jurisdiction in the county court to assign dower in a case like this, Sec. 8, of Ch. 23, Comp. Stat., provides as follows: "When a widow is en-

titled to dower in the lands of which her husband died siezed, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever county the lands may lie, by the judge of probate for the county in which the estate of the husband is settled, upon the application of the widow, or any other person interested in the lands," etc.

This provision of statute was enacted long before the adoption of the present constitution, and at most can only be construed to be a limitation upon the general power conferred upon county courts by that instrument to "have original jurisdiction in all matters of probate, settlements of estates of deceased persons," etc. Jurisdiction being thus conferred by the constitution, it is a question whether, even under the provisions of the above statute, it can be taken from it merely at the volition of a party respondent. But if it be granted that it can be done by pleading facts and the presentation of an issue or issues which the county court is incompetent to try—such, for instance, as the title to land, or the relationship of husband and wife—it will not be denied that such issue must be actually presented by proper pleading, and cannot arise by implication. Ordinarily a question of jurisdiction may, and in some cases must be made at the very threshold; but here the right of the petitioner to dower must be first disputed by an answer setting up facts which, when proved, will overthrow the claim of the petitioner. If the facts thus pleaded are of a nature which the county court by its organization is incompetent to try, whatever might or might not be its duty in the absence of further legislation, it is quite clear that to proceed to a final adjudication of the matter in that court would be erroneous, if not void. But the essential thing to do on the part of the respondent is to present the issue, to raise the dispute which will take the case out of the jurisdiction of the court. What fact was presented by the answer of the

respondents for the adjudication of the county court in the case at bar? None whatever, as I think. In saying this I do not overlook the last line of respondents' answer, "denying all other allegations in said petition contained." While this was probably meant as a mere formal, general denial, the court was, I think, justified in disregarding it, for the reason that it is not couched in positive language, but is a mere recital. But I will not impugn the good faith of the respondents by supposing that they ever intended to deny the relation of husband and wife which existed between the petitioner and the deceased at the time of his death. Such intention is clearly negatived by them in their answer filed in the district court and by the principal executor when on oath as a witness in the case. The paper itself was intended as a plea in abatement to the jurisdiction of the court, and was so claimed by counsel at the bar, and not an answer to the merits or to the petitioner's right to recover. I am therefore of the opinion that the petitioner's right to dower was not disputed in the manner contemplated by the statute so as to oust the county court of jurisdiction.

The district court reversed the judgment of the county court in so far as the same related to the homestead rights of Mary J. Guthman on the ground above stated. Upon the consideration of this case in the consultation room, we were all of the opinion that the reason was quite untenable, yet that the judgment would probably have to be affirmed for the want of sufficient allegations in the petition to entitle the petitioner to the assignment of her homestead. But upon a more careful examination of the petition I have come to the conclusion that it is sufficient. It has been often said in this court, with the approval of every member of it, present as well as past, that the homestead law, being of a highly remediable nature, would be liberally construed, and this liberal construction should follow it in every stage, and certainly will not be withdrawn from it when its benefits are invoked by the widow.

The central fact which could have been set up in the petition on which to base a judgment for the assignment of petitioner's homestead rights is, that the land described, or a designated portion of it, was and constituted the homestead of the petitioner and the deceased husband at the time of his death. The terms of the law supply all of the rest. The husband was the head of the family, while in life; as such he acquired the homestead estate. At his death it descended to his widow and family; to her not as the head of a family, but his widow *eo nomine*. Comp. Stat., Ch. 36, § 17.

It must be admitted that neither the constitution nor the statute gives to county court jurisdiction to assign a homestead to a widow or family in terms. But it is embraced in the general jurisdiction of all matters of probate, settlement of estates of deceased persons, etc. I conclude, therefore, that the county court had jurisdiction to render the judgment which it did render, and that accordingly the district court had jurisdiction on appeal.

It may not be out of place in this connection to say, for the guidance of the lower courts, that the homestead set apart and assigned to the petitioner in this proceeding must be held by her as well for the benefit of the respondent, Minnie Ellen Guthman, during her minority, as for herself, as a home, and while the same is rented out during said minority the said Minnie Ellen will be entitled to share equally with the petitioner in the net rental profits thereof.

The judgment of the district court in so far as it affirms the judgment of the county court is affirmed, and in so far as it reverses the judgment of the county court is reversed, and the judgment of the county court is in all things affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOSEPH CHRISMAN, PLAINTIFF IN ERROR, V. THE STATE,
DEFENDANT IN ERROR.

1. **Corrupting Witnesses: INDICTMENT.** In an indictment for attempting to corrupt a witness in a judicial proceeding, it need not be alleged that such witness had been sworn, recognized, or subpoenaed in such judicial proceeding.
2. ———: ———: **EVIDENCE.** When such judicial proceeding involved a trial upon an indictment for a crime or misdemeanor, it was not error to admit in evidence upon the trial of the case at bar the said indictment, with the name of such witness attempted to be corrupted endorsed thereon as a witness on the part of the state.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hazlett & Bates, for plaintiff in error.

William Leese, Attorney General, for the state.

COBB, CH. J.

The plaintiff in error was indicted, tried, and convicted in the district court of Gage county for the offense of attempting to corrupt and influence, and of corrupting and influencing one C. R. Woodard, by offering to and paying him the said C. R. Woodard a sum of money to leave the county and go beyond the jurisdiction and process of the state, and not appear against him, or testify against him as a witness in a certain criminal proceeding then pending against him.

The defendant demurred to the indictment on the ground that the same did not contain facts sufficient to constitute a crime under the laws of the state of Nebraska, which demurrer was overruled.

A trial was had to the court, a jury being waived. The

court found the defendant guilty, overruled his motion for a new trial, and sentenced him to pay a fine of five hundred dollars and be imprisoned in the county jail for a period of thirty days, etc.

The first point presented by plaintiff in error in his petition in error, and urged in the brief of counsel, arises upon the overruling of the demurrer to the indictment. In order to the consideration of this point I copy the substantial part of the indictment:

"That Joseph Chrisman * * * being then and there charged with a criminal offense and duly indicted under lawful authority by the grand jury of said county, of the December term of the district court of said county in the year eighteen hundred and eighty-three, for the crime of cutting one C. R. Woodard with intent to kill him, the said C. R. Woodard, in the county of Gage, and state of Nebraska aforesaid, and he, the said Joseph Chrisman, being then and there held to bail under said charge to appear at the February term of the said district court aforesaid, the said court having jurisdiction of the said offense, unlawfully did then and there attempt to corrupt and influence, and did corrupt and influence one C. R. Woodard then and there being, by offering to and paying to him, the said C. R. Woodard, the sum of fifty dollars with the further offer and promise to the said C. R. Woodard, of the further sum of money of five hundred and twenty-five dollars to corruptly and unlawfully influence and procure him, the said C. R. Woodard, to leave the said county of Gage and state aforesaid, and go beyond the jurisdiction and process of said district court and secrete himself so that the said C. R. Woodard could not be obtained as a witness on the part of the state of Nebraska in the said action aforesaid against the said Joseph Chrisman aforesaid, the said C. R. Woodard being then and there a very important in said action, and in fact the prosecuting witness in the said cause so pending as aforesaid against

the said Joseph Chrisman. And so the grand jurors aforesaid do say that the said Joseph Chrisman then and there in the manner and form aforesaid, unlawfully and willfully did attempt to influence and did influence and corrupt the said C. R. Woodard, a witness as aforesaid, by money and promises as aforesaid, well knowing that the said C. R. Woodard was a witness as aforesaid," etc.

The section of the statute under which this indictment was found is section 164 of the Criminal Code, and is in the following words:

"Sec. 164. If any person shall attempt to corrupt or influence any juror or witness, either by promises, threats, letters, money, or other undue means, either directly or indirectly, every person so offending shall be fined in any sum not exceeding five hundred dollars and imprisoned in the jail of the county not exceeding thirty days."

It is urged that the indictment fails to charge an offense under the provisions of the section quoted. There is an evident omission of the word witness where it should have first occurred in the form of indictment used. But I think it sufficiently appears on the face of the indictment that C. R. Woodard was a witness in the action then pending in said court and set out in the indictment. The indictment expressly alleges that the said C. R. Woodard was the prosecuting witness in said cause, and I am at a loss to perceive how he can be held to be any the less a witness, because he is the prosecuting witness.

I think the word witness is used in the section above quoted in a broad sense, and that it is not necessary that the witness should be alleged to have been either subpoenaed or recognized to appear and testify as a witness in the case. If I am right in this view, then it is sufficient in the indictment to describe the person corrupted, as a witness. Nor do I think that the use of the word prosecuting, as qualifying the word witness, vitiates or changes its meaning.

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If the person accused is guilty of the offense charged, he generally knows who are the witnesses who can testify against him, as well before as after they are recognized or subpoenaed, and an interpretation of the law that would leave him free to corrupt them until after they are sworn or even recognized on subpoena is certainly inadmissible.

There was evidence tending to prove that the money was paid and promise made by the plaintiff in error to Woodard for the purpose of inducing him not to appear and testify at the trial.

There was no error in the admission of the indictment with the name of Woodard endorsed thereon as a witness as evidence at the trial. As we have seen, evidence that Woodard was a witness on the trial of the case in which the indictment was the principal pleading was responsive to the principal point made in the case.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18 110
44 96

18 110
62 760

H. H. SPELLMAN, HENRY SPELLMAN, AS H. H. SPELLMAN & Co., AND J. W. SCHMIDT, PLAINTIFFS IN ERROR, V. ABRAHAM FRANK, AUGUST FRANK, AND JOSEPH FRANK, AS A. FRANK & SONS, DEFENDANTS IN ERROR.

1. **Petition in Action on Note.** In an action upon a promissory note when a copy of the note sued upon is set out as a part of the petition, it must be alleged that there is due thereon from the adverse party to the plaintiff a specific sum, unless these facts may be inferred from others pleaded. *Gage v. Roberts*, 12 Neb., 276.
2. **Pleading not Amendable in Supreme Court on Original Motion.** When on a hearing on error in the district

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court leave is asked to amend a pleading to correspond with an order of the county court and such leave is refused, this court in the exercise of its appellate jurisdiction cannot grant leave for such amendment when asked by an original motion filed in this court.

ERROR to the district court for Lancaster county. Heard below before MITCHELL, J.

James E. Philpott, for plaintiffs in error.

A. C. Platt, for defendants in error.

REESE, J.

The only question presented in this case is, whether the petition filed in the county court states a cause of action. It is as follows:

“Abraham Frank,
August Frank, and
Joseph Frank, as
A. Frank & Sons,
 Plaintiffs,

vs.

H. H. Spellman,
Henry Spellman, as
H. H. Spellman & Co., and
J. W. Schmidt,
 Defendants.

“The plaintiffs herein complain of the defendants, and for cause of action in this behalf say that said defendants are indebted to them to the amount of \$480.00 and interest, for one promissory note as follows, to-wit:

\$480.00. July 30, 1884. To A. Frank & Sons. Ten per cent interest from date.

NOTE.—In *Humphries v. Spofford*, 14 Neb., 488, on appeal leave was given plaintiff to amend petition in the district court so as to correct a mistake, on payment of costs, the cause being remanded to the district court for that purpose.—REP.

Spellman v. Frank.

"Protested Dec. 2, 1884, Firth, Neb., by C. M. Wittstruck. Fees, \$2.60." A true copy of note and protest is hereto attached, as exhibit 'A,' and made a part hereof, and that the same is now due and remaining unpaid; wherefore plaintiffs pray for judgment for the sum of \$480.00, with interest from the 30th day of July, 1884, at the rate of ten per cent per annum, and protest fees, \$2.60, with costs of this action, and such other and further relief as may be due in the premises.

"*Exhibit 'A.'*

"\$480.00.

FIRTH, NEB. July 30, 1884.

Four months after date, for value received, we promise to pay to the order of A. N. Frank & Sons, four hundred and eighty dollars, with interest at the rate of ten per cent per annum from date until paid. Negotiable and payable at the Firth Bank, Firth, Neb.

"H. H. SPELLMAN & Co.,

"J. W. SCHMIDT."

The certificate of protest is also attached as part of exhibit "A," but as it cannot enter into the question in this case it is not necessary to set it out here.

As the amount claimed by the petition is not within the jurisdiction of the county judge when exercising the ordinary powers and jurisdiction of a justice of the peace, but is within the jurisdiction of the county court, and the case is what is known as a term case in that court, the rules of procedure and practice as applicable to the district court must be applied to the pleading under consideration. Compiled Statutes, §§ 10 and 11, Ch. 20. This being true, the decision in *Gage v. Roberts*, 12 Neb., 276, seems to be in point and decisive of the case. As in the case above cited, so in this case, there is no allegation that plaintiffs in error executed the note in question, nor that there is due defendants in error from plaintiffs in error the sum for which judgment is demanded. It may also be noted that

the note seems to be signed by a partnership or firm designated as "H. H. Spellman & Co.," yet there is no allegation in the petition that defendants in error were associated together as such firm, and that the note was their note.

It is clear that the petition does not state a cause of action.

Upon the cause being called for argument in this court, defendants in error asked leave to interline in the petition after the words, "that the same is now due and remaining unpaid," the words "on said promissory note from said makers, H. H. Spellman, Henry Spellman, and J. W. Schmidt, to these plaintiffs, the sum of \$480.00, with interest from July 30th, 1884, at ten per cent, no part of which has been paid," for the purpose of correcting the transcript to correspond with the amendment ordered by county court. It appears that at the trial in the county court, and upon the application of defendants in error, they were permitted so to amend the petition by interlineation, but the amendment was not in fact made. At the hearing in the district court, upon error, the amendment not having been made below, defendants in error moved the court for leave to make the amendment there, which was refused. We are not asked to review the action of the district court, but a new motion is made in this court.

As the jurisdiction of this court is appellate only, in such cases, there is no warrant for granting the motion, and it is therefore overruled.

The judgment of the district court is reversed, and the cause is remanded with directions to the district court to reverse the judgment of the county court, and for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

18	114
22	480
18	114
36	658
37	252
18	114
39	43
39	70
c39	618
18	114
40	32
18	114
44	850
18	114
48	460
18	114
50	235
50	338
53	741

THE CITY OF LINCOLN, PLAINTIFF IN ERROR, V. JOHN
GILLILAN, DEFENDANT IN ERROR.

1. **Trial:** CONCLUSION FROM UNDISPUTED FACTS A QUESTION FOR JURY. Where the existence of a state of facts is undisputed, and where upon such facts different minds may honestly draw different conclusions from them as whether or not such facts establish negligence or the absence thereof, the question as to the conclusion to be arrived at is a proper question for the trial jury, and not for the court.
2. **Instructions to Jury.** Where an instruction to a jury states a proposition clearly and distinctly, and without limitation or qualification, it is not error for the court to refuse to re-instruct the jury upon the same proposition, but with the addition of a clause limiting the force of the instruction when such limitation would be against the interest of the party asking the instruction. Or, if error, it would be error without prejudice.
3. ———. When an instruction is once given it is sufficient, and it is not error for the court to refuse to repeat it to the jury.
4. ———. It is not error for the trial court to refuse to instruct a jury upon questions not involved in the case on trial. Instructions should be confined to the issues in the case.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

A. C. Ricketts (*H. H. Wilson* with him), for plaintiff in error.

Court should have taken case from jury. *L. S. & M. S. R. R. v. Miller*, 25 Mich., 274. *Penn. Co. v. Rathgeb*, 32 Ohio State, 66. *McLoury v. McGregor*, 54 Iowa, 717. On instructions refused: *Reynolds v. R. R.*, 58 N. Y., 248. *Thompson Neg.*, 1236. *Rudolph v. French*, 44 How. Pr., 160. *Greenleaf v. R. R.*, 29 Iowa, 46. *Warner v. R. R.*, 64 N. Y., 465. *Benson & Titcomb*, 72 Maine, 31. *Hart v. R. R.*, 84 N. Y., 56. *Beatty v. Gilmore*, 16 Penn. State, 463. *Otis v. Janesville*, 47 Wis., 422. *Bassett v.*

St. Joseph, 53 Mo., 590. *Brown v. Glasgow*, 57 Id., 157. *Mount Vernon v. Dosonchett*, 2 Ind., 586. *Braker v. Covington*, 63 Id., 33.

A. J. Sawyer and N. Z. Snell, for defendant in error, cited: *A. & N. R. R. v. Bailey*, 11 Neb., 332. *City of Lincoln v. Walker*, post. *Henry County v. Jackson*, 86 Ind., 111. *Wheeler v. Westport*, 30 Wis., 392. *Murphy v. Indianapolis*, 83 Ind., 76. *Looney v. McLean*, 129 Mass., 33. *McKenzie v. Northfield*, 16 N. W. R., 264. *Commissioners v. Burgers*, 16 Md., 29. *Bassett v. Fish*, 75 N. Y., 303. *Palmer v. Deering*, 93 Id., 7. *Mathews v. Baraboo*, 39 Wis., 674.

REESE, J.

The original action was instituted by defendant in error against plaintiff in error for the purpose of recovering damages alleged to have been sustained by him by reason of a defect in one of the public streets in the city of Lincoln. The allegation of the petition is, and the proof shows, that on the evening of the 11th day of November, 1882, while defendant in error was riding along the street, his horse stepped into a mud hole or wagon rut and fell, throwing defendant in error upon the ground and breaking his leg.

The first proposition contended for by plaintiff in error is, that the testimony "establishes, beyond any controversy, the existence of such facts as render defendant in error guilty of contributory negligence, as a matter of law, and therefore the trial court erred in submitting the case to the jury."

To this we are unable to agree. It appears that a week or ten days before the accident defendant in error saw the defect in the street, but there is no proof of his having seen it afterwards. It was his custom to ride from his home, east of the city, to his place of business, using for that purpose a horse, or colt, three years old the spring before.

The proof is that the horse was gentle and sure-footed. On the evening in question—some time after dark—he mounted the horse to go home. The night was quite dark and a storm was approaching from the north-west. He allowed his horse to go at a “lope,” selecting its own part of the street. The speed at which the horse traveled was not rapid, a witness testifying that he kept opposite to him while running along the sidewalk. Defendant in error was familiar with the street, having traveled it almost daily until a short time before the accident. Applying to these facts the rule of law adopted in *A. & N. R. R. Co. v. Baily*, 11 Neb., 332, we think it was clearly right for the trial court to submit the case to the jury. In that case Judge COBB, in writing the opinion, quoted with approval the following language from *Railroad Co. v. Stout*, 17 Wall., 657, viz.: “Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. * * *

It is assumed that twelve men know more of the common affairs of life than does one man; they can draw wiser and safer conclusions from admitted facts thus occurring than a single judge.

“In no class of cases can this practical experience be more wisely applied than in that we are considering.

“We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us that, although the facts are undisputed, it is for the jury and not for the judge to determine whether the proper care was given, or whether they established negligence.”

In the case at bar the trial judge submitted the question of contributory negligence to the jury with instructions for their guidance, and in this we think there was no error.

Plaintiff in error requested the court to instruct the jury as follows :

4. "The plaintiff was bound to exercise ordinary care for his personal safety while passing along the streets of the defendant, and if the jury believe from the evidence that plaintiff's slight negligence, if any, contributed directly to the alleged injury, then you will find for the defendant." This instruction was given as prayed.

It then requested the court to give the following instruction :

7. "If the jury believe from the evidence that there was a slight want of ordinary care on the part of the plaintiff, which slight want of ordinary care contributed to the injuries complained of, the plaintiff can not recover unless the jury further find the negligence on the part of the defendant was so gross as to justify the jury in finding that the alleged injury was caused by the willful and malicious act of the defendant or its agents or servants." The court refused to give this instruction, and this refusal is assigned as error.

Without stopping to inquire as to whether or not these instructions were applicable to the case, we will be content with a comparison of the two.

If there is any appreciable difference between "slight negligence," as used in the first of the above instructions, and a "slight want of ordinary care," as used in the second, we are wholly unable to see that difference, and will assume that they mean substantially the same thing. The first instruction informs the jury that if the slight negligence of defendant in error contributed directly to the injury they should find for the plaintiff in error. This virtually excluded all consideration of the negligence of plaintiff in error, whether slight or gross. The proposition

was short but clearly stated. If defendant in error contributed to the accident by slight negligence he could not recover, however negligent the plaintiff in error might have been. The second instruction is virtually a reiteration of the first, with the qualification or limitation that would destroy the force of the instruction if the jury should find that plaintiff in error had been guilty of the gross negligence mentioned. Had the court refused to give the first and had given the second there might have been a question, as the limitation did not exist in the first. But as the first contained all in favor of plaintiff in error that was in the second, we see no cause for complaint. If there was error it was without prejudice. If an instruction is once given it is sufficient, and it is not error for the trial court to refuse to repeat it to the jury. *Kopplekom v. Hoffman*, 12 Neb., 100.

Plaintiff requested the trial court to give the following instruction to the jury:

"The jury is instructed that a city is not liable to respond in damages because of every depression or inequality in the surface of its streets even though injury result therefrom. It is only liable when it fails to keep its streets in a reasonably safe condition for public travel, and it is not necessary that it should keep the entire width of its streets in good condition for travel, unless the public convenience and travel demands it; and if you find from the evidence that a sufficient width of the street, at the point of the alleged injury, was in a reasonably safe condition for public travel, and that the plaintiff could have passed over and along the same without injury by the exercise of ordinary care and prudence, then you will find for the defendant."

The court refused to give this instruction and the refusal as assigned as error. Before examining this instruction it may be observed that instructions one and ten, which were asked for by plaintiff in error and given, to some degree cover the same ground as the instruction above quoted. They are as follows:

1. "The jury is instructed that the defendant city is not an insurer against accidents upon its streets, nor is it liable for every defect therein, though it might cause the injury sued for. And if you find from the evidence that the street at the place of the alleged injury was in a reasonably safe condition for travel in the ordinary modes, then you will find for the defendant."

10. "The jury are instructed that defendant city is only required to exercise ordinary care and prudence in keeping its streets in repair, and unless you find from the evidence that the defendant failed to exercise ordinary care and prudence in the repair of its streets, at the place of the alleged injury, then you will find for the defendant."

By a comparison of the foregoing instructions it will be seen that the instruction refused was substantially given by numbers one and ten, except that part which would exonerate plaintiff in error from keeping the entire width of its streets in good condition for travel, unless the public convenience and travel demanded it. This branch of the instruction refused was not applicable to the case and was therefore properly refused. It is quite probable that a city is not required to keep the entire width of its streets in good condition under some circumstances, while under others it would be necessary, and that, too, without regard to whether the public convenience and travel demanded it or not. If part of the space included in a street, owing to the conformation of the surface, could not be made suitable and safe for travel and no effort thereto was made, then it might be allowed so to remain, perhaps, without the city incurring any liability; or, if in the case at bar it had been shown that the city had not undertaken to improve the whole street, or that the street at the point of the accident had been at an unfrequented part of the city, in that event it would have presented a question to submit to the jury as affecting the primary liability of the city, or of the care or negligence of the parties. But as the record and testi-

mony shows that the place where the accident occurred was within the business and frequented part of the city, and that it had undertaken and assumed to improve the street from one sidewalk to the other, thus acknowledging a duty and responsibility in that behalf, we can not see that the trial court erred in refusing to submit to the jury the question thus presented by the instruction. It is provided by the law governing cities of the second class that: "The mayor and council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances." * * Sec. 31, Chap. 14, Compiled Statutes.

Other instructions were requested by plaintiff in error, and refused, and of which refusal complaint is now made, but upon examination of the record we find they were all substantially given by being embodied in other instructions and it would subserve no good purpose to quote them here.

It is also insisted that the court should have instructed the jury that it was incumbent on defendant in error to show that no negligence of his contributed to the injury, and that upon him rested the burden of proof as to the absence of such contributory negligence; but as the question was fully presented to the jury by repeated instructions that he could not recover if his own negligence contributed in any way to the injury we will notice it no further. It is sufficient to say that, under the instructions given, the jury must have found that defendant in error was guilty of no negligence whatever. The judgment cannot therefore, be reversed, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JANE BUCHANAN, CHARLES F. BUCHANAN, OSCAR H. BUCHANAN, JOSEPH B. BUCHANAN, EMMA V. BUCHANAN, WALLACE W. BUCHANAN, AND ELMER BUCHANAN, APPELLANTS, V. NATHAN K. GRIGGS, WILLIAM H. ASHBY, AND NATHANIEL HERRON, APPELLEES.

18	121
20	166
18	121
56	573
18	121
62	260

1. **Conveyance of Real Estate by Minor to Father: MORTGAGE AFTERWARDS GIVEN WILL NOT DISAFFIRM DEED.** When a minor conveys real estate to his father in possession, and the father soon afterwards executes a mortgage thereon, and in a short time thereafter dies, the son being one of the heirs of his estate, the execution of a mortgage on the real estate by the son four years after he attains his majority will not of itself amount to a disaffirmance of the deed made to the father, the mortgage not being inconsistent with the deed as it conveys no title and can have full force upon the interest of the mortgagor which he has in the estate by inheritance.
2. —: **FORECLOSURE OF MORTGAGE GIVEN BY FATHER.** In such case, where the mortgage executed by the father is foreclosed after the son has attained his majority and he is made a party defendant, the foreclosure of the mortgage and conveyance of the real estate by the sheriff upon an order of sale will be an entire bar against the son and all persons claiming under him.
3. —: **THIRD PARTIES BARRED.** And where, during the pendency of the suit to foreclose the mortgage executed by the father, the son executes a mortgage to a third party, such third party will also be barred by the foreclosure proceedings.
4. **Equity Jurisdiction: DECREE SET ASIDE FOR MISTAKE, ETC.** Where by mistake or misunderstanding of parties a party having a perfect defense to an action which he has plead and is prosecuting is induced to abandon his defense, believing in good faith that such a decree will be entered and proceedings had as will perfect and quiet his title to real estate which he has purchased, and to which he has a perfect title, and, while relying upon what he believes the promise of the opposite party, such proceedings are had as will virtually destroy his title, he may, in equity, have the decree and proceeding set aside in order that he may make his defense.

APPEAL from the district court of Gage county. Tried below before BROADY, J.

L. M. Pemberton, for appellants. Decree should be set aside. Freeman on Judgments, § 492. 3 Pomeroy Eq. Jur., §§ 1365, 1371, note 2. *Erie R. R. v. Ramsey*, 45 N. Y., 637. *Holland v. Fratter*, 22 Gratt., 136. *Pearce v. Olney*, 20 Conn., 544. *Moore v. Barclay*, 16 Ala., 158. *Adams v. Adams*, 51 New Hamp., 388, and cases cited. Plaintiffs should have decree ordering sheriff to execute deed to Armstrong or his assignee, Buchanan. 2 Jones Mort., § 1652. Rorer Jud. Sales, §§ 438, 950-954. *Huxley v. Rice*, 40 Mich., 73. Deed was not disaffirmed. *Boot v. Mix*, 17 Wend., 119. *Irvine v. Irvine*, 9 Wall., 617. *Goodnow v. Lumber County*, 31 Minn., 168. *Keil v. Healey*, 84 Ill., 104. *Bingham v. Basley*, 55 Tex., 281. *Jones v. Jones*, 46 Iowa, 473. 2 Kent Com., 237. *Bigelow v. Kinney*, 3 Vt., 353. *Terry v. McClintock*, 41 Mich., 492.

N. K. Griggs, for appellees, cited: *Colby v. Brown*, 10 Neb., 414. 2 Kent Com., 238, note a. Tyler on Infancy, § 31. *Baylis v. Dinely*, 3 Maule & Selw., 482. *Curton v. Patton*, 11 Sergt. & Rawle, 311. *Tucker v. Moreland*, 10 Peters, 58. *Jackson v. Carpenter*, 11 Johns., 539. *Chapin v. Shafer*, 49 N. Y., 407. *Vaughan v. Parr*, 20 Ark., 600. *Prout v. Wiley*, 28 Mich., 164. Jones Mortgages, 1371-3. *Phillips v. Reeder*, 18 N. J. Eq., 95. *Hogendobler v. Lyon*, 12 Kan., 276. *Halstead v. Shepard*, 23 Ala., 558. *Bigelow v. Topliff*, 25 Vt., 273. *Lansing v. Montgomery*, 2 Johns., 382. *Bigelow Estoppel*, 593-4, 541, 601. 2 Smith's Leading Cases, 662.

REESE, J.

Plaintiffs, as the widow, heirs at law, and administrators of Job Buchanan, filed their petition in the district court,

in which they allege, substantially, that Job Buchanan died on the 18th day of Sept., 1880; that on the 4th day of July, 1871, Samuel Jones was the owner in fee-simple of the north-west quarter of the south-west quarter of section number eleven, in township number four north, of range number six east of the sixth principal meridian; and that on that day he executed and delivered a mortgage on said property, together with other real estate owned by him, to one John Armstrong, to secure the payment of the sum of \$4,200.00, due in one year after date, and which mortgage was also signed by the wife of said Samuel Jones; that Jones died on the 8th day of February, 1872; that John Armstrong assigned the note and mortgage to one William Null, who, on the 3d day of October, 1872, commenced an action to foreclose the mortgage. On the 8th day of November, 1877, Null obtained a decree of foreclosure, the amount of the decree being \$4,300.00. During the year 1878 Null sold and transferred the decree to one James M. Armstrong, who afterwards sold and transferred it to said John Armstrong, the original mortgagee. On the 26th day of July, 1880, John Armstrong sold and transferred it to said Job Buchanan, now deceased. On the 31st day of July, 1880, an order of sale was issued, and on the 7th of September, of the same year, the land was sold by the sheriff, under the order of sale, to the said Job Buchanan, which sale was confirmed by the district court and a deed ordered, which was executed by the sheriff on the 22d day of March, 1881, and the deed duly placed on record in the deed records of Gage county; that by these proceedings the plaintiffs became the owners of the fee-simple titles to the real estate in dispute.

It is further alleged that on or about the 13th day of April, 1874, and while the foreclosure suit was pending, one John Jones, who was the son and heir of Samuel Jones, and who was one of the defendants in the foreclosure proceeding, with a fraudulent intent, executed and delivered to

the defendants, Nathan K. Griggs and Wm. H. Ashby, a mortgage for \$500.00 upon said land, and that the mortgage was placed upon the mortgage records of Gage county, and that the only consideration therefor was an agreement on the part of said defendants that they should defeat the foreclosure proceedings; that if they failed to do so the mortgage should be null and void; and that they did fail to defeat the foreclosure; that at the time of the execution of said mortgage the said John Jones had no right, title, or interest in or to the land, except as one of the heirs of said Samuel Jones, then deceased, all of which said Griggs and Ashby well knew, and that all of said interest of said John Jones was forever barred and foreclosed by this final decree and sale under the foreclosure of the mortgage executed by Samuel Jones; that on the 31 of December, 1878, Griggs and Ashby commenced an action in the same court for the purpose of foreclosing the mortgage executed to them by John Jones, and made the heirs and administrators of Samuel Jones, as well as John Armstrong, who was then the owner of the decree above referred to, parties defendant; and that John Armstrong appeared and filed his answer, setting up the foregoing facts, and which were a full defense to the action, when a contract was entered into between John Armstrong and Ashby and L. W. Colby, who was the attorney for Griggs and Ashby, whereby Armstrong, for a valuable consideration, purchased the note and mortgage from Griggs and Ashby, and it was agreed that he was to have all their interest therein and in the foreclosure thereof, the same to be prosecuted to a final termination in their name but for his benefit, and that he was to be the owner of the decree when finally obtained, and that upon the sale of the property it was to be bid in for him; that Armstrong made no further defense to the foreclosure suit and allowed them to take their final decree, relying upon their agreement that it was to be done for his benefit, the decree being rendered on the 1st day of October, 1879;

Buchanan v. Griggs.

that the consideration paid for said note and mortgage was the full amount they would have been entitled to had their note been based upon a valid consideration; that after the decree was rendered the land was to be bid in by them in his name; that the land was sold by the sheriff under the decree and order of sale, and on the 10th day of April, 1880, and in pursuance of said agreement, the real estate was sold, nominally, to Griggs and Ashby, who bid it in, in their own names, but for the use and benefit of said Armstrong, and that he being the real party for whom the land was purchased, he became entitled to a deed upon confirmation of the sale, which took place on the 13th day of April, 1881. On the 26th day of July, 1880, Armstrong sold and assigned to Job Buchanan all his interest in the decree, and by a quit-claim deed conveyed to him all his interest in the real estate, and Buchanan took the property subject to taxes and costs, which he assumed and agreed to pay; that from the time of the making of the agreement between Armstrong and defendants, Griggs and Ashby, until the sale of the property by the sheriff, Ashby acted as the attorney for Armstrong and Buchanan, and advised the purchase by Buchanan of Armstrong's interest, and that relying thereon Buchanan made the purchase; that the sale to defendants was confirmed, but that they now claim that they are the owners of the decree, and that they purchased the property for themselves, and not for Armstrong, and that they are entitled to a deed, and unless restrained from doing so the sheriff would make to them instead of to Armstrong a deed of conveyance; that they claim that said John Jones was the absolute owner of the mortgaged premises at the time of the execution of the mortgage by him to them, and that the mortgage created a valid lien upon the land; that the basis of their claim is, that in the year 1869 John Jones, being then a minor, owned the land, and while yet a minor conveyed it to his father, Samuel Jones, who mortgaged it to Armstrong in 1871, and that

after attaining his majority disaffirmed the conveyance and mortgaged to them. But that John Jones not only did not disaffirm the conveyance after attaining his majority, but that he fully affirmed and ratified the same, and that he and all persons claiming under him are estopped to set up any claim thereto by reason of his minority at the time of his conveyance to his father; and that, at all events, Griggs and Ashby are estopped from setting up any claim by reason of the proceedings had in connection with the contract with Armstrong and the entering of the decree of foreclosure.

An injunction was prayed for restraining the execution of the deed by the sheriff, and that he be decreed to execute the deed to Armstrong or Buchanan; that their title be quieted as against defendants and all persons claiming under them, or that the mortgage from John Jones be declared null and void, and to create no lien upon the premises adverse to plaintiffs, and that the decree of foreclosure and sale by the sheriff be annulled and set aside, and for general relief.

To this petition the defendants answered, admitting the death of Samuel Jones, and the representative capacity of plaintiffs, the execution of the note and mortgage by him, their assignment to William Null, the rendition of the decree of foreclosure in his favor, the assignment to James Armstrong and his assignment to John Armstrong, and the assignment by him to Job Buchanan, and the execution of the sheriff's deed, but deny that Samuel Jones was the owner of the land in question at the time of the execution of the mortgage. They also admit the execution of the mortgage to them by John Jones, and that, at that time they were in partnership, the subsequent foreclosure proceedings by them, the execution of the contract with Armstrong, but allege that it was afterwards rescinded. They admit that they claim to be the owners of the decree, and that they demand a deed from the sheriff, and allege

that they are entitled to it. They allege that John Jones, in 1869, and when a minor, conveyed the premises to his father, Samuel Jones, deny that upon attaining his majority he ratified the conveyance, but allege that he expressly disaffirmed it, and mortgaged the land to them, and that at the time of making the mortgage he was the legal and equitable owner thereof.

The answer then reviews the allegations of the petition, and plead various estoppels which we do not deem it necessary here to notice.

After trial the plaintiffs filed an "amendment to their petition to make it correspond with the facts proven," by which they allege that after the rescission of the contract between Armstrong and Ashby and Colby, on the 12th of February, 1880, another agreement was made between Armstrong and Ashby in which it was agreed between them that in consideration of what Armstrong had paid Ashby, amounting to over \$700, Ashby was to put Armstrong in possession of the property in controversy, and was to carry out the original contract made between Armstrong and Ashby and Colby, and that Ashby was to proceed to have the property sold and purchased in the name of Armstrong, and the deed made to him, and that, relying upon the agreement with Ashby, he paid no further attention to the matter, but paid to Ashby the said sum of \$700. That defendants did bid in the land, but in their own name instead of his.

A trial was had which resulted in a finding and decree by the court, setting aside the sale made by the sheriff, but holding that the lien created by the mortgage and decree of foreclosure was a valid and subsisting lien in favor of defendants, dissolving the injunction, and ordering the resale of the property. From this decree plaintiffs appeal.

According to our view of the case the decree of the district court cannot stand. By the pleadings and proofs it is established beyond any question that John Jones, while

a minor, received a conveyance of the land in question from his father, and reconveyed it to him. The deed made by the father was on the 20th day of February, 1869. The reconveyance was on the 21st day of September, 1870. The mortgage to Armstrong was executed July 4th, 1871. On the 22d day of January, 1872, John attained his majority. On the 8th day of February, 1872, Samuel Jones died. From the time of the acquisition of the title by Samuel Jones—long prior to the conveyance to John—until his death he was in the possession of the land, John never at any time being in possession. On the 13th day of April, 1874, John Jones executed the mortgage to defendants, that being the first act of his with reference to the land. The proceeding to foreclose the mortgage executed by Samuel Jones was commenced on the third day of October, 1872, to which John, then having attained his majority, was made a party defendant, which action was pending at the time of the execution of defendants' mortgage.

It cannot be said that the bare execution of this mortgage was a disaffirmance of the conveyance to Samuel Jones, for two reasons:

First. Before the simple execution of a deed made by a person after coming of age will amount to a disaffirmance of a conveyance made during minority, the second deed must be of as high a character as the first. That is, it must appear on its face to undo that which has been done by the former deed. If the first is an absolute conveyance, so must the second be in order to work a disaffirmance of the first within itself. *Jackson v. Burchin*, 14 Johns., 124. *Jackson v. Carpenter*, 11 Id., 539. *Bool v. Mix*, 17 Wend., 132. *Eagle Ins. Co. v. Lent*, 1 Edw., 301. *Tucker v. Moreland*, 10 Peters, 58.

Again, we think it is well established, both upon principle and authority, that the second deed must be so inconsistent with the first that both deeds cannot stand, in

order of itself to work a disaffirmance of the first. *McGan v. Marshall*, 7 Humph., 121. *Eagle Ins. Co. v. Lent*, 6 Paige, 635. Schouler's Domestic Relations, 588 (2d Ed.)

"In this state a mortgage of real estate is a mere pledge or collateral security creating a lien upon the mortgaged property, but conveying no title nor vesting any estate, either before or after condition broken." *Davidson v. Cox*, 11 Neb., 250.

Second, At the time of the execution of the mortgage to defendants, John Jones was one of the joint owners of the land with the other heirs of Samuel Jones (he being then deceased), subject only to the mortgage made by Samuel to Armstrong, the life estate of his mother, and the claims of the creditors of his father, if any existed, assuming that he did not desire to disaffirm the conveyance to Samuel. This interest was a mortgageable one and was subject to the decree in the foreclosure suit. Jones on Mort., § 1411, 1314.

There is nothing shown by way of declaration or recital in the mortgage which would indicate any intention of the mortgagor to disaffirm any prior act of his. It may also be noted as a circumstance tending to throw some light on his intention at the time of the execution of the mortgage, that on the 16th day of May, 1876, he conveyed the real estate in question to one M. W. Thompson, and in the deed he expressly excepts from the covenant of warranty the mortgage executed by his father to John Armstrong, the exception being as follows: "Subject, however, to a mortgage executed by Samuel Jones to John Armstrong, dated January 5, 1871, and recorded in the records of Gage county, book B, page 161." The deed also excepts the mortgage executed to defendants. It is true that the date is referred to as "January 5th, 1871," while the mortgage to Armstrong was dated July 4th, 1871, but it is proven that Samuel Jones never executed but the one mortgage to John Armstrong, and there can be no doubt but that it was the

one referred to in the deed. It was clearly impossible for the mortgage to Armstrong to stand unsupported by any title in Samuel Jones. His title was derived from John Jones. By the reservation in the deed to Thompson, John Jones clearly recognized the validity of the Armstrong mortgage. Schouler Dom. Rel., 438. By that he recognized the validity of his deed to his father. The deed to Thompson was executed more than four years after John's majority. Had it been the intention of John Jones to disaffirm the deed executed by him to his father it would be quite reasonable and in accord with ordinary human action for him to have done some act which would have unequivocally demonstrated that intent. No such demonstration has been made. The foreclosure of the Armstrong mortgage was persistently fought in the courts, being finally decided in *Jones v. Null*, 9 Neb., 57, but not upon the ground that Samuel Jones had no title to the land at the time of the execution of the mortgage or that John had disaffirmed his deed to him. If he had such a defense and desired to avail himself of it, he was called upon to do it in that action. It is very evident such was not his intention. Such being the case, it is clear that Griggs and Ashby, having received the mortgage during the pendency of that action, could stand in no better or more advantageous position than did their grantor. Jones on Mortgages, § 1411. *Metcalf v. Pulvertoft*, 2 Ves. & B., 208. *McPherson v. Housel*, 13 N. J. Eq., 301. *Jackson v. Losee*, 4 Sand. Ch. 407. *Zeiter v. Bowman*, 6 Barb., 133. *Griswold v. Miller*, 15 Id., 520. *Cleveland v. Boerum*, 3 Abb. Prac., 294. *Ostrom v. McCann*, 21 Howard's Pr. Rep., 431. The foreclosure of the Armstrong mortgage forever barred the rights of John Jones in the land, and with his, the rights of Griggs and Ashby and of Thompson. The execution of the sheriff's deed conveyed to the purchaser all the title of all the parties to the action. Jones on Mortgages, § 1654. *Young v. Brand*, 15 Neb., 601. See also § 853 of the Civil Code.

 Bayha v. Webster County.

Prior to the time the contract between Ashby and Armstrong was made, Griggs and Ashby virtually had no standing in court in their foreclosure proceeding, and the defense plead by Armstrong was a complete bar to their recovery. The testimony is contradictory as to what the real agreement between them was. Griggs insists he gave no person any authority to make it for him. As all contracts must be mutual to be binding, if he was not bound Armstrong was not, and has therefore been deprived of his defense unjustly. Taking the testimony for our guide, it is evident there has been a mutual misunderstanding between the parties, and by that misunderstanding Armstrong has been deprived of his defense in the suit of Griggs and Ashby against Jones and others.

It follows that the decree of the district court must be reversed, and the decree in the case of Griggs & Ashby against Jones and others, together with all proceedings thereunder, set aside and vacated, and Armstrong or his grantee be permitted to make his defense.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN P. BAYHA, PLAINTIFF IN ERROR, V. THE COUNTY
OF WEBSTER, DEFENDANT IN ERROR.

Officers: MUST PERFORM WORK FOR COMPENSATION ALLOWED BY STATUTE. A public officer must discharge all the duties pertaining to his office for the compensation allowed by law, and will not be allowed compensation for extra work unless it is authorized by statute.

ERROR to the district court for Webster county. Tried below before GASLIN, J.

18	131
84	453
18	131
36	383
18	131
46	30
18	131
48	287
18	131
51	722
18	131
58	453

W. H. Stroh, for plaintiff in error.

Gilham & Rickards, for defendant in error.

REESE, J.

The only question presented for decision in this case is, whether there is a legal liability against defendant in error for services rendered by plaintiff in error in the year 1883, in making out the tax list. Plaintiff in error presented his claim for the sum of \$440 to the commissioners of defendant in error, which was rejected. An appeal was taken to the district court, where plaintiff in error filed his petition alleging the facts of the performance of the labor, etc. A demurrer to his petition was filed, the ground of demurrer being that the petition did not state a cause of action. This demurrer was sustained, and plaintiff brings the cause into this court for review by proceedings in error.

The contention on the part of plaintiff in error is, that the duty of making out the tax list was an extra one, and not one of the ordinary official duties of the county clerk as such officer. That it is for the benefit of the county, and that there is an implied obligation to pay for it, and that he is at least entitled to thereasonable value of his services.

While it is possible that there may be a moral obligation resting upon defendant to render a compensation for the services rendered, yet it is quite clear there is no legal obligation.

The act of February 19th, 1877, page 46, Laws of 1877, provided that the county clerk should receive the sum of four cents for each description of lots and lands and the extension thereof on the tax list and duplicate, including footings and recapitulation. This act was an amendment of certain sections contained in the act entitled "An act to provide a system of revenue," which took effect February 15th, 1869, and repealed the act of February 26th, 1873.

The act of March 1st, 1879, Comp. Stat., Ch. 77, expressly repealed the act of 1869, together with "all acts and parts of acts supplemental to and amendatory thereof." As the act of 1877, above referred to, was amendatory of the act of 1869, it is clear that it was repealed by the act of 1879. That being the case no provision remained providing for services rendered in preparing the tax lists.

In *The State v. Silver*, 9 Neb., 88, it was held that, "A public officer must discharge the duties pertaining to his office for the compensation allowed by law, and no compensation for extra services can be recovered or allowed unless authorized by statute." Our attention has been called to no legislative act providing for the payment of such claims as the one presented by plaintiff.

It follows that the decision of the district court was correct, and its judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PHCEBE J. MORRISON, PLAINTIFF IN ERROR, V. JONATHAN NEFF, DEFENDANT IN ERROR.

Public Lands of United States: ORIGINAL LOCATION OF A SECTION CORNER, HOW DETERMINED. Where a stone purporting to be the north-east corner of a section was 52 rods east of the true section line, as shown by the surveys both north and south of it, and there was no evidence tending to show that it had been placed there by the government surveyors, nor had it been seen until about four years after the original surveys; *Held*, That the quantity of land contained in the subdivisions of the section in question, and the one east of it, and the field notes and plats of the original survey were properly received in evidence for the purpose of determining the original location of the section corner.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

Hazlett & Bates, for plaintiff in error.

J. E. Bush and *W. H. Ashby*, for defendant in error.

MAXWELL, J.

This is an action of ejectment brought by the plaintiff against the defendant to recover the possession of "about fifty rods in width off of the east side across the north-east quarter of section 30, township 2 north, range 6 east, in Gage county." The defendant is the owner of the north-west quarter of the north-west quarter of section 29, township 2 north, range 6 east (lot 2). The question involved is the location of the section line between sections 29 and 30. An opinion was filed in this case in 1884, the judgment being reversed, and is reported in 20 N. W. R., 254.*

A rehearing was granted, and the cause is again submitted.

The land in controversy is situated on what was formerly the Otoe reservation, and was surveyed in the year 1873. A stone purporting to be the corner stone at the north-east corner of section 30, is 52 rods east of the true line between sections 29 and 30, as shown by the section corner on the south line of said section 30, and by the section line on the north, so that the section line from the corner contended for by the plaintiff runs nearly south-west to the south line of the section. No witness swears to the location of the corner by the government surveyors at the point indicated, nor did any witness testify to seeing the stone there prior to 1876 or 1877. The court below found the issues in favor of the defendant, and rendered a decree

* NOTE.—This opinion was withheld from publication in the regular series of Reports by direction of its writer.—REP.

quieting his title. We approve of the points stated in the syllabus in this case in the opinion heretofore filed, and also in *Johnson v. Preston*, 9 Neb., 474, and adhere to those decisions. And when it is shown that a corner was established by the government surveyors, its location cannot be changed by evidence showing that it is incorrect. But the question here is, where was the government corner located? That is the only question in the case. To determine this the court may examine all the facts tending to show the original location. Thus, the quantity of land returned as being contained in the several subdivisions of sections 29 and 30 is evidence tending to show the correctness of the survey and location of the lines. It is true this evidence would not prevail against proof of the location of a corner, but in the absence of such proof it may be considered. Thus, in this case we find that the plaintiff purchased and has title to one hundred and twenty acres of land; that the defendant purchased lot 2 in the N. W. $\frac{1}{4}$ of section 29, which contains $41\frac{20}{100}$ acres. If the plaintiff should obtain the land she is seeking to recover, she would obtain nearly 140 acres, while the defendant would obtain but little more than one-half of the amount purchased and paid for by him.

The field notes also may be considered where a government corner is destroyed or its existence is in dispute; so with plats of the government survey. All these are fingerboards, as it were, which point in the direction of the original corner as located by the surveyors. The court will then weigh carefully all the evidence presented, and determine the fact. In this case we think that the court below was fully justified from the evidence in finding, as it must have done, that the stone 52 rods east of the true line was not placed there by the government surveyors, and in proceeding thereupon to determine from the evidence the true location.

There are strong equities in favor of the defendant, and

Doolittle v. Wheeler.

justice as well as law approves the judgment of the court below, which is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM DOOLITTLE, PLAINTIFF IN ERROR, v. ERASTUS
M. WHEELER, DEFENDANT IN ERROR.

Where the evidence on each side is of nearly equal weight, and the only objection to the finding and judgment is that they are against the weight of evidence, they will not be set aside.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

A. C. Platt and Harwood, Ames & Kelley, for plaintiff in error.

D. A. Snyder, for defendant in error.

MAXWELL, J.

On the 19th of October, 1878, the defendant executed and delivered to the plaintiff his promissory note for the sum of \$250, due January 22d, 1879, payable at the Commercial Bank of Brooklyn. There is an indorsement thereon made by the plaintiff of the sum of \$113, October 19th, 1879. The plaintiff brought an action on this note to recover the balance claimed to be due thereon. The defendant in his answer admits the execution of the note, but alleges that he paid the same by executing, on the 22d day of January, 1879, a note in lieu of the one sued on, which second note he has since paid. On the trial of the cause in the court below a jury was waived and the cause

Lawson v. Gibson.

submitted to the court, which found the issues in favor of the defendant, and dismissed the action.

The principal question in issue is, whether the note alleged to have been made January 22d, 1879, in lieu of that of October 19th, 1878, was in fact executed. Upon this point there is direct conflict in the testimony, some of the defendants swearing positively that such a note was executed, and has since been paid, while the plaintiff denies that it was ever executed, the evidence being nearly evenly balanced. In such cases the finding of the court below will be upheld. A number of technical objections are made to certain evidence introduced on the trial, which do not affect the real merits of the controversy. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

ROBERT P. LAWSON, APPELLANT, V. JENNETTE F. GIBSON ET AL., APPELLEES.

1. **Judicial Sale: NOTICE OF SALE.** The provisions of the code which require public notice of the time and place of the sale of real estate upon execution to be given "for at least thirty days before the day of sale, by advertisement in some newspaper," etc., are not satisfied by one publication of the notice at least thirty days before the day of sale.
2. —: —. The word "for," as used in the section above quoted, means "during," and the notice must be published for or during thirty days before the day of sale. *Whitaker v. Baker*, 12 Kas., 493, approved.
3. **Statutes: REPEAL BY IMPLICATION.** A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.

18	137
18	820
21	602
18	137
24	656
35	572
18	137
38	669
38	760
18	137
42	638
18	137
46	907
18	137
49	432
51	619
54	655
55	66
18	137
58	736
58	763

APPEAL from order confirming sale of real estate in the district court of Lancaster county. POUND, J., presiding.

J. H. Foxworthy, for appellant.

Ricketts & Wilson, for appellees.

MAXWELL, J.

This action was commenced in the district court of Lancaster county in 1882, and a decree of foreclosure and sale rendered in favor of the defendant and against certain real estate held by the plaintiff on a B. & M. land contract. The amount of the decree was \$777.35. In October, 1884, an order of sale was duly issued on said decree and the premises appraised at the sum of \$1,400, the total liens and incumbrances being \$470, which, deducted from the gross amount, made the net value as found by the appraisers to be the sum of \$950. The mortgaged premises were thereupon advertised for sale on the 24th of October, 1884, in the *State Journal*, of Lincoln, that the sale would take place on the 26th day of November of that year. But one publication was made. Objections were made to the confirmation of the sale upon this ground, which were overruled and the sale confirmed. This is now assigned for error.

Sec. 497 of the code provides that, "Lands and tenements taken in execution shall not be sold until the officer causes public notice of the time and place of sale to be given for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or, in case no newspaper be printed in the county, in some newspaper in general circulation therein, and by putting up an advertisement on the court-house door, and in five other public places in the county, two of which shall be in the precinct where such lands lie. All sales made without

such advertisement shall be set aside, on motion, by the court to which the execution is returnable."

It is claimed by the appellee that *one* notice, published at least thirty days before the day of sale, is a full compliance with the statute, and *Craig v. Fox*, 16 Ohio, 563, is cited in support of that position. In that case the notice was published in the Cincinnati *Daily Enquirer* of April 15, and in the weekly of the 19th and 26th of April, and the 3d and 10th of May. The sale took place May 16 of the same year (1843). The *Daily Enquirer* circulated almost entirely in the city, and the weekly in the county adjacent, and were read by different sets of subscribers. Burchard, Ch. J., in delivering the opinion of the court, states that the notice was insufficient, because it failed to state the time and place of sale. After quoting the statute, he says (page 566): "It is urged that these words require consecutive insertions of the notice during the period of thirty days. This construction of the statute has been practiced upon very generally in many parts of the state. * * * I look, then, to the statute in order to gather the meaning and intention of the legislature. Its words will be answered, 'by one publication inserted in a newspaper thirty days before the day of sale,' etc. This view, he states, was concurred in by another member of the court, which at that time consisted of four judges. Thus it will be seen that the question was not before the court, and the alleged decision but an expression of two of the judges. The doctrine, that in adopting the statute of another state we adopted the construction placed upon it by its highest court, therefore, need not be considered.

The question here involved was before the supreme court of Kansas in *Whitaker v. Beach*, 12 Kas., 493, and it was held that the notice must be first published at least thirty days before the day of sale, and continued in each successive issue of the paper up to the day of sale. The construction given by that court to the word "for" as equiv-

alent to "during," in connection with the words, "At least thirty days before the day of sale," we think is correct, and we adopt that construction. The meaning of the statute, therefore, is that the notice shall be published during at least thirty days before the day of sale. Not necessarily in a daily paper; a weekly, no doubt, will answer the requirements of the statute, but the publication must be continued for at least thirty days. The object of the notice is to give publicity to the sale, and thereby invite competition and secure the best price possible for the property. This can only be done by a full compliance with the statute, and the court should see to it that its terms and provisions have been substantially complied with. As this was not done in this case the judgment of the court below, confirming the sale, is reversed.

2. It is claimed by the appellant that the statute (Sec. 498 of the Code) authorizing the confirmation of sales in vacation was repealed by implication by Sec. 39 of the "Act to amend Chapter 18, of the Revised Statutes of 1866, entitled Courts," which took effect March 1, 1879, at least so far as relates to the procedure. Comp. Stat., Chap. 19. It is evident, however, that there is no repugnancy between the several provisions. A statute will not be repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. *Foster's Case*, 6 Coke, 59. 1 Roll., 91. 10 Mod., 118. In *Stone v. Green*, 3 Hill, 472, Cowen, J., says: "A construction which repeals former statutes or laws by implication is not to be favored in any case." The law in that regard was very clearly stated by Chief Justice Gantt, in *Johnson v. Hahn*, 4 Neb., 140. See also *White v. City of Lincoln*, 5 Id., 514. *People v. Weston*, 3 Id., 323. *State v. Maccuaig*, 8 Id., 217. *Ex parte Wolf*, 14 Id., 31. In this case there is no repugnancy between the statutes, and the earlier one is not repealed by the later. The judge, therefore, had authority to confirm the

State v. Babcock.

sale at chambers. *State Bank v. Green*, 8 Neb., 298. There are other assignments of error, to which it is unnecessary to refer.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE, EX REL. D. M. WIAINT ET AL., v. H. A. BABCOCK, AUDITOR, AND E. P. ROGGEN, SECRETARY OF STATE.

County Bonds: LIMITATION ON ISSUE. Under the provisions of the act of 1873, as amended in 1883, authorizing counties to issue bonds "to pay the outstanding unpaid bonds, warrants, and indebtedness of a county," such bonds, with those previously issued and unpaid, cannot exceed ten per cent of the assessed valuation of the county.

ORIGINAL application for mandamus.

Harwood, Ames & Kelly, for relator.

William Leese, Attorney General, for respondents.

MAXWELL, J.

This is an application for a mandamus to compel the defendants to register certain bonds of Franklin county. It appears from the petition that the assessed valuation of Franklin county for the year 1884 was the sum of \$824,389.34; that previous to that year, said county had issued its bonds for internal improvements to the amount of \$37,000. At the election in November, 1884, the question of

issuing \$49,000 of funding bonds was submitted to the electors of that county, and carried by the requisite majority. Funding bonds to the amount of \$49,000 were thereupon issued and presented to the defendants for registration and certification. The defendants refused to certify that the bonds were "issued pursuant to law," upon the ground the bonded debt of the county would thereby exceed ten per cent of the assessed valuation for the year 1884. The question involved is the authority of the defendants to certify bonds issued in excess of ten per cent of the assessed valuation.

In 1877 an act was passed by the legislature "to provide for the funding of the warrants and outstanding indebtedness of counties." Sec. 1 provides, "That the county commissioners of any county in the state of Nebraska be and are hereby authorized and empowered to issue coupon bonds of such denominations as they may deem best, sufficient to pay the outstanding and unpaid warrants and indebtedness of such county. *Provided*, That the county commissioners of any such county may limit the provisions of this act to any fund or funds of said county. *Provided further*, That on no event shall bonds be issued to a greater amount than ten per cent of the assessed valuation of such county. *And provided further*, That the county commissioners of any such county shall first submit the question of issuing bonds to a vote of the qualified electors of such county." Laws 1877, 219. This law was substantially re-enacted in 1879. Comp. Stat., Ch 18, § 132. In 1883 this section was amended by inserting the words "unpaid bonds," so that as amended it reads * * "sufficient to pay the outstanding and *unpaid bonds*, warrants, and indebtedness of said county," etc. * * * "*Provided further*, That in no event shall bonds be issued to a greater amount than ten per cent of the assessed valuation of said county."

The question is, does this provision restrict the entire

issue of bonds by the county to ten per cent? We think it does. There is no inherent power in a county to issue bonds, but the authority must be expressly conferred by statute. *Hollenbeck v. Hahn*, 2 Neb., 397-8. *Stewart v. Otoe County*, Id., 183. *Hamlin v. Meadville*, 6 Id., 227. In the case last cited it is said (page 233): "Whatever may be the rule as to municipal corporations, counties have no authority at common law to issue bonds. * * The power to issue commercial paper must be conferred by statute, and such power must be exercised in the manner prescribed." This, in our view, is a correct statement of the law. The power to issue bonds must be expressly given or result from other powers conferred. In this case the issue of bonds is limited to ten per cent. We cannot restrict this to funding bonds without injecting words into the statute which are not necessarily implied. The language applies to all bonds and we must so construe it. We therefore hold that the issue of funding bonds, with bonds previously issued and unpaid, cannot exceed ten per cent of the assessed valuation of the county. As the bonds issued in this case, with those previously issued, exceeded that sum, the defendants are not in default in refusing to certify the same. The writ must therefore be denied.

WRIT DENIED.

THE other judges concur.

18	144
18	189
18	144
32	39
18	144
39	869
18	144
46	589

**CHARLES H. TRUMBLE, PLAINTIFF IN ERROR, V. MARY
OPHELIA WILLIAMS AND OTHERS, DEFENDANTS IN
ERROR.**

18	144
60	576
18	144
61	841

1. **Administration of Estate: REMOVAL OF ADMINISTRATOR: RESIGNATION OF TRUST.** Where an administrator is about to remove from the state he may resign his trust, and an order of the proper tribunal discharging him cannot be attacked in a collateral proceeding. COBB, CH. J. dissents.
2. ———: **POWER OF ADMINISTRATOR DE BONIS NON.** An administrator *de bonis non* has the same powers in administering the estate as the first administrator, and will take up the business of settling the estate at the point where his predecessor ceased to act; therefore where the first administrator had filed a petition in the proper court for the sale of real property of the decedent for the payment of debts due from the estate, a license to sell may be issued to the administrator *de bonis non* upon the petition previously filed. In such case the administration is continued by the same official—the administrator, although a different person.
3. ———: **JURISDICTION: PETITION TO SELL REAL ESTATE NOT SUBJECT TO ATTACK IN COLLATERAL PROCEEDING.** A petition for license to sell real property for the payment of debts of an estate, filed in the court having exclusive original jurisdiction, and which was acted upon by that tribunal and treated as sufficient, is not, in the absence of fraud or collusion, subject to attack in a collateral proceeding. The want of verification of a petition is not an element of jurisdiction.
4. ———: ———: The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale and the sufficiency of the pleadings presented to the court for that purpose.
5. ———: **EVIDENCE.** Where the record of an administrator's sale of real estate, or any paper or instrument pertaining to the same is lost, destroyed, or cannot be found, the statute authorizes the party affected to prove the contents as in case of other lost instruments. Evidence, *Held*, To have been improperly excluded.
6. **Jurisdiction.** Titles to real property acquired under proceedings of courts having jurisdiction cannot be attacked in collateral proceedings.

ERROR to the district court for Cass county. Tried below before MORRIS, J., sitting for POUND, J.

Chapman & Polk, for plaintiff in error, cited: *Steel v. Street*, 89 Ill., 51. *State v. Carroll*, 25 Conn., 449. *Clark v. Commonwealth*, 29 Penn. St., 129. *Cocke v. Halsey*, 16 Pet., 71. *Hobson v. Swan*, 63 Ill., 146. *Hobson v. Ewing*, 62 Ill., 146. *Wilson v. South Park*, 70 Ill., 46. *Seward v. Dillier*, 16 Neb., 58. *Howard v. Moore*, 2 Mich., 227. *Thompson v. Tomlie*, 2 Pet., 168. *Grignon's Lessee v. Astor*, 2 How., 319. *Good v. Norley*, 28 Iowa, 188. *Holmes v. Beal*, 9 Cush., 223. *Moore v. Porter*, 51 Wis., 487.

Marquett, Deweese & Hall, for defendants in error, cited: 1 *Williams Ex.*, §§ 330, 463, 479, 484, and cases cited. *Wade on Notice*, 483. *Shipman v. Butterfield*, 11 N. W. R., 283. *Gregory v. McPherson*, 13 Cal., 562. *Townsend v. Tallent*, 33 Cal., 45. *Snydor v. Palmer*, 32 Wis., 406. *Hartwig v. The People*, 22 N. Y., 95. *Dunning v. Corwin*, 11 Wend., 661. *Sharp v. Johnson*, 4 Hill, 99.

MAXWELL, J.

This is an action of ejectment brought by the defendants in error against the plaintiff, in the district court of Cass county, to recover the possession of the west half of the south-west quarter of section 27, T. 10 N., R. 12 E., in Cass county.

The defendant below (plaintiff in error), in his answer, alleges that one William H. Taylor died in June, 1865, seized of said premises; that after the death of said Taylor, "to-wit, on or about the 12th day of August, 1865, one Isaac N. Shambaugh was duly and legally appointed and qualified as administrator of the estate of the said William H. Taylor, deceased, by the probate court of Otoe county, territory of Nebraska, and gave bond in the sum of \$2,000,

which was duly approved;" that "on the 12th day of February, 1866, the said court, on the petition of the said Isaac N. Shambaugh duly and legally presented to said court, issued a license as provided by law authorizing and empowering the said administrator to sell the real estate of the said William H. Taylor, situated in Otoe and Cass counties, Nebraska, of which the above described lands were a part, said sale to be subject to the approval of said court." The land in question was thereupon offered for sale, but not sold for want of bidders; that on the 14th of May, 1866, Shambaugh tendered his resignation as administrator to the probate court, which was duly accepted, and a petition was thereupon filed in said court for the appointment of C. W. Seymour as administrator of the estate of said Taylor, deceased, and due notice thereof given, and afterwards said Seymour was duly appointed and gave a bond in the sum of \$5,000 for the faithful performance of his duty; that thereafter said court issued a license to said Seymour to sell said real estate, and in pursuance thereof "said administrator, after duly and legally advertising and appraising said lands as required by law, sold the same to Mary E. Taylor; that said sale was afterwards duly and legally ratified, approved, and confirmed by said court and the said administrator ordered to execute and deliver in due form of law a deed to Mary E. Taylor for said lands."

It is also alleged that the sale was confirmed by the district court in 1870. The conveyance of the land in question to Mary E. Taylor, in 1866, is then alleged, and the conveyance by her to one McMahon is then averred, together with an allegation of various conveyances to several parties till they reach the defendant below. The plaintiffs below, in their reply, deny that "Shambaugh was ever discharged as administrator or that he surrendered the administration of said estate, or was in any manner legally relieved from the duties of administration originally imposed upon him." * * * "Deny that there was any sale of

said real estate by the said administrator as provided by law, and deny that there was any approval or confirmation of said sale or pretended sale either by Isaac N. Shambaugh or the said C. W. Seymour." They also deny that "Seymour was ever duly or legally appointed as administrator of said estate, and deny that he ever procured an order for the sale of said real estate."

On the trial of the cause the court excluded evidence of the appointment of Seymour as administrator and all subsequent proceedings relating to the sale of the land, and found the issues in favor of the defendants in error. The testimony of the plaintiffs below was taken by deposition and read in their behalf on the trial, from which it appears that the plaintiffs are the children of William H. Taylor, deceased; that Mary O. Williams was born in 1850; that Rufus A. Taylor was born in 1854, and Lillie B. Wheeler in 1859; that their father, William H. Taylor, came to Nebraska City to reside about the year 1857 or 1858, and continued to reside there until the spring of 1865, when, being in very poor health, he attempted to remove to Harrodsburg, Kentucky, but died at Louisville, on his way thither; that Mary E. Taylor was the widow of William H. Taylor, and the mother of the plaintiffs.

The defendant below also offered in evidence the petition for the appointment of Shambaugh, the notice of the application, the order of appointment, the bond, letters of administration, order fixing the time for creditors of the estate to file their claims, inventory of real and personal property, petition to sell real estate, the order to sell the same, and the return of Shambaugh of not sold for want of bidders. Shambaugh thereupon resigned, and Seymour, upon petition, after due notice, was appointed in his stead. The reason for Mr. Shambaugh's resignation is stated in Mrs. Taylor's testimony. She testifies that, "when my husband left Nebraska, he left his business in the hands of Mr. I. N. Shambaugh as his attorney, and some time after my

husband's death Mr. Shambaugh wrote to me that he was going to move to Missouri, and that Mr. Seymour would make application for appointment as administrator of my husband's estate."

The first question presented is the authority of the probate court to accept the resignation of Shambaugh and appoint Seymour.

Section 187 of the law in relation to decedents (Comp. Stat., Ch. 23) provides that, "if any administrator shall reside out of this state, or shall neglect, after due notice by the judge of probate, to render his account and to settle the estate according to law, or to perform any decree of such court, or shall abscond or become insane, or otherwise unsuitable to discharge the trust, the probate court may, by an order therefor, remove such administrator."

Section 189 provides that, "when an administrator shall be removed, or his authority *shall be extinguished*, the remaining administrator may execute the trust; if there be no other the court of probate may commit administration of the estate not already administered to some suitable person, as in case of the death of a sole administrator."

These sections certainly confer authority on the probate court to accept the resignation of an administrator. Here the administrator was about to become a non-resident of the state, consequently the process and judgment of the court would be ineffectual to reach him and compel an accounting. In other words, the administrator who was about to go beyond the jurisdiction of the court surrendered his trust to the court with a statement of his administration to that date. The court thereupon accepted his resignation, in effect removed him for what appeared to be sufficient cause, and afterwards appointed another administrator; this it had authority to do. *Marsh v. People*, 15 Ill., 284. 1 Am. Probate R., 27.

It is clear from the evidence introduced and offered that the probate court of Otoe county had acquired jurisdiction

in the premises; that debts against the estate of W. H. Taylor to the extent of several hundred dollars had been proved, and that it was necessary to sell real property belonging to said estate to pay the same. That tribunal therefore had the authority to remove an administrator whenever sufficient cause for removal was presented to it, and its action in that regard, even if it erred, cannot be questioned in a collateral proceeding. The action of the probate court in appointing or removing an administrator is subject to review, but until set aside is voidable only, and in a collateral proceeding must be treated as valid. The first objection, therefore, is untenable.

2. That no petition was ever presented by Seymour for license to sell real estate. The testimony shows that a petition had been filed by Shambaugh for the sale of the real estate in question, and a license had been issued thereon, under which the land in question had been offered for sale, but not sold for want of bidders.

Section 190 of the decedent's act provides that, "an administrator appointed in the place of any former executor or administrator, for the purpose of administering the estate not already administered, shall have the same powers and shall proceed in settling the estate in the same manner as the former executor or administrator should have had or done, and may prosecute or defend any action commenced by or against the former executor or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator."

This section makes the two administrators the same as one, and the second may complete any business commenced by the first. By the second appointment a new trustee is appointed, who took up the trust at precisely the same point the powers of the former trustee ceased. In other words, the new administrator was clothed by the statute with the same powers as the former, and began the business at the point where the former ceased to act. Administration was

continued by the same official—the administrator, but by a different person.

The former license to sell had been of no avail by reason of the want of bidders. The necessity for a sale, however, still existed to pay debts due from the estate; and this fact was made to appear to the probate court of Otoe county by the petition for the sale of such real estate then on its files, and the report of Mr. Shambaugh of his inability to make the sale. There was no necessity, therefore, for a second petition, and that filed by Mr. Shambaugh was sufficient to authorize the probate court to issue license to sell to Mr. Seymour. The second objection, therefore, is unfounded.

3. It is claimed that the petition for license “is defective, and not in accordance with the statute, giving the court no jurisdiction to grant license to sell, and is therefore void.” The first defect alleged is, that the petition is “not sworn to.” In answer to this objection it is sufficient to say that the defect, if such it is, does not affect the jurisdiction of the court; and cannot be attacked in a collateral proceeding. *Johnson v. Jones*, 2 Neb., 126.

In the case cited it is said (page 138): “The affidavit to the petition was not an element of jurisdiction without which the court could not act. It was at most merely a formal part of the petition, a preliminary form in commencing suit; and its omission amounts to one of those irregularities which cannot be collaterally called in question, even if the proceedings had taken place before an inferior tribunal. See *Wright v. Marsh, Lee & Delevan*, 2 Greene (Ia.), 108. *Cropsey v. Wiggenhorn*, 3 Neb., 116. *Wilson v. Maacklin*, 7 Id., 52. *Hull v. Miller*, 4 Id., 503. *Dorington v. Meyer*, 8 Id., 214.

Upon the filing of the petition for the sale of the real estate in question by Shambaugh, the probate court made an order fixing the 12th day of February, 1866, as the time for a hearing on the petition, and ordered a notice of

the time to be published six consecutive weeks in the Nebraska City *News*. On February 12th, 1866, the court, after finding that the notice had been duly published, adds, "and there appearing no objection to the granting of said license, and the necessity for the same having been made to appear to the satisfaction of the court, and the court being fully advised, doth order that license be and is hereby granted to Isaac N. Shambaugh, administrator of the estate of W. H. Taylor, deceased, which said real estate is described as follows:

"E. S. REED,

"Probate Judge."

Then follows the license giving a description of the real estate to be sold. The petition, in our view, states sufficient to authorize the court to issue the license; but even if it did not, and the court would so hold in a direct proceeding to set it aside, yet, where it has been acted upon as sufficient by the court having exclusive original jurisdiction of the subject matter, it will be sustained in this court when collaterally attacked where there was no collusion and fraud. The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale, and the sufficiency of the pleadings presented to the court for that purpose, and where it has jurisdiction its orders and judgments are valid until set aside. There is nothing, therefore, in this objection.

4. The attorney for the defendant below offered to prove by Seymour that, as administrator of Taylor's estate, and under the license offered in evidence, he advertised and sold the land in controversy in the manner provided by law; that he reported the sale to the probate court of Otoe county, and that said court, about the month of October, 1866, confirmed said sale, and the administrator was ordered to make a deed for said premises to the purchaser. This testimony was excluded, and the rejection of the same is now assigned for error.

In view of the loose condition in which the probate court records were kept in some of the counties of the state, the legislature of 1873 passed an act which provides, "That in all cases where lands have been sold by order of the probate court in any county in the territory or state of Nebraska, on application of the guardian of any minor child, or children, or executor, or administrator, and it shall appear in any action in any court held within this state relating to the title to such land, that the record or any part of the record of such sale is imperfect or deficient, or that such record or any part thereof, or any paper or papers, notice, affidavit, document, instrument, or any proceeding whatsoever, from the filing of the petition for license to sell until the execution of the deed to the purchaser, has been lost or destroyed by fire or otherwise, or cannot be found, the contents of such record, paper, notice, affidavit, document, instrument, or other proceeding may be proved in the same manner as in case of other lost instruments or papers, by secondary evidence, and when so proved they shall have the same effect as if proven by the production of the original record, paper, notice, affidavit, document, instrument, or other proceeding, or by a duly certified copy thereof." Comp. Stat., Ch. 20., § 39.

This statute applies in all cases where the records in the probate courts or any part thereof are lost or destroyed. As it was made to appear that there was no record of the confirmation of the sale in the probate court, etc., the statute authorizes proof of such facts by secondary evidence. The court, therefore, erred in excluding the evidence offered. The court also erred in excluding the deeds from Seymour to Mary E. Taylor for the land in question. One of these was made soon after the sale in 1866, and the other after a confirmation of the sale by the district court of Otoe county, August 25th, 1873. The first of these deeds, in connection with the proof of confirmation of sale offered, was admissible in evidence; while the second con-

tains within itself sufficient recitals to entitle a party claiming under it to its protection.

5. The land in question was sold soon after the close of the war, when there was but little immigration to this then territory, and consequently the value of real estate was depressed. The land seems to have sold for its full value at that time, and the fact that it had been once offered and remained unsold for want of bidders shows that competition for it was not active. A creditor of the estate, however, was entitled to be paid, and to have the property sold for that purpose. Carrying out this purpose the court granted a license for the sale of the land, and the sale was made to the mother of the plaintiffs. The consideration, so far as appears, was applied to the payment of the debts of the estate, while the plaintiffs' mother was enabled a few years afterwards to sell the land at a considerable advance. This money, no doubt, in whole or in part was used in the nurture and education of the plaintiffs. But, however this may be, the original purchase price was used in paying their father's debts, and the purchaser should be protected. If this was not so it would be impossible for an executor or administrator to sell real property belonging to the estate of the decedent for the payment of debts due from the estate for any sum near its true value. No one but a speculator in disputed titles would care to invest in property the title of which might be overturned many years afterwards, and the effect would be to prevent competition, depress the value of the property, and in many cases deprive creditors of their just dues. But such is not the law. Titles acquired under the proceedings of courts having jurisdiction must be deemed inviolable in collateral proceedings. And there are no judicial sales around which greater sanctity should be placed than those made of the estates of deceased persons by order of a court upon which the statute has conferred exclusive jurisdiction of the subject. *Seward v. Di-*

McLain v. State.

dier, 16 Neb., 58. *Gregon's Lessee v. Astor*, 2 Howard, 339. *Thompson v. Tolmie*, 2 Peters, 162. *Ballou v. Hudson*, 13 Gratt., 672. *Mohr v. Porter*, 8 N. W. R., 536. *Hall v. Low*, 102 U. S., 461. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur, COBB, CH. J., dissenting from the first point stated in the syllabus.

18	154
20	173
18	154
42	528
18	154
45	836
18	154
49	407
51	155
54	133
54	192

JOHN McLAIN, PLAINTIFF IN ERROR, v. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Instructions Upheld.** The instruction of the court to the jury examined, and *Held*, Free of objection in point of law, and as favorable to the accused as the evidence would justify.
2. **Confession.** When no confession or admission of guilt has been made by a party on trial for a criminal offense, it is immaterial what inducements may have been held out to him for the purpose of obtaining a confession or admission of guilt.
3. **Argument of Attorney.** Where the language used by the district attorney or assistant counsel, in opening a case or summing up to a jury, is deemed prejudicial to the accused, "the attention of the court should be called to it, by proper objection, and a ruling had thereon. If the objection is overruled and an exception taken, the question may be reviewed in the supreme court upon the language, objection, ruling, and exception being made a part of the record by a proper bill of exceptions, but not otherwise." *Bradshaw v. State*, 17 Neb., 147.
4. ———. *Held*, Not error on the part of the court to allow counsel for the state, in summing up to the jury, to comment upon the presumption of guilt arising from the possession, by the accused, of recently stolen goods, without explanation of such possession, even where counsel fail to state the law with technical accuracy.
5. **Evidence Sufficient.** The evidence in the case, *Held*, Sufficient to sustain the verdict.

ERROR to the district court for Otoe county. Tried below before POUND, J.

J. L. Mitchell and *John C. Watson*, for plaintiff in error, on instruction No. 6, cited: *Mullins v. People*, 110 Ill., 42. *Maltese v. State*, 59 Ohio State, 215. On instruction No. 9, cited: *Watson v. Commonwealth*, 95 Penn. State, 413. *State v. Sidney*, 74 Mo., 390. *People v. Hurley*, 60 Cal., 74. On instruction No. 10, cited: *State v. Harden*, 46 Iowa, 623. *State v. Jaynes*, 73 N. C., 504. *Howard v. State*, 50 Ind., 190. On confession of prisoner, cited: *People v. Wentz*, 37 N. Y., 303. *Boyd v. State*, 2 Humph., 39. Wharton Cr. Ev., 651. Argument of attorney. *State v. Williams*, 18 N. W. R., 682. Crim. Code, § 473. *Festner v. O. & S. W. R. R.*, 17 Neb., 280.

William Leese, Attorney General, for the state, cited: *Jaynes v. Commonwealth*, 2 Met., 32. *Straight v. State*, 43 Tex., 486. 1 Whart. Crim. Law, § 695. *State v. Mortimer*, 20 Kan., 97. *State v. Johnson*, 21 N. W. R., 843. *Fitzgerald v. Fitzgerald*, 16 Neb., 415. *Donovan v. Yard*, Id., 33.

COBB, CH. J.

The plaintiff in error was indicted, tried, and convicted, in the district court of Otoe county, of the crime of grand larceny, in the stealing of a quantity of gold and silver watches, watch cases, and jewelry, the property of Alexander Calmelet. The cause having been brought to this court on error, the questions presented arise upon the sufficiency of the evidence, the admission of the testimony of the witness Dennis Kay, misconduct of the prosecuting attorneys, the refusal to charge, and the charge as given by the court. These questions will be discussed in the order in which they are presented in the brief of counsel.

It appears from the bill of exceptions that the store of Mr. Calmelet is situated on Main, between Fifth and Sixth streets, Nebraska City, on the south side of the street. The store had two doors, one front and one in the rear. On the afternoon of Saturday, the 5th day of April, 1884, at five minutes to six o'clock, Mr. Calmelet locked up his store and went to supper, at the Morton House, a few blocks distant. He was absent from the store thirty-five minutes. When he returned he found that an entrance had been effected by removing a glass from the back window, reaching in, and turning the key which had been left in the back door, and drawing the bolt, and the watches, watch cases, and jewelry above mentioned taken.

The matter was placed in the hands of the sheriff of the county, who, the next day, had printed a circular containing a description of the property stolen, and an offer of a reward for its return and the apprehension of the thief. Copies of this circular were mailed to sheriffs and police officers throughout the country, including the chief of police of Chicago. On the morning of the 14th day of the same month the defendant was arrested in the shop of a pawnbroker, in the city of Chicago, by Dennis Kay, a police officer. At the time of his arrest he had in his possession and on his person a part of the watches, watch cases, and jewelry, stolen as aforesaid, about half in value of the same. It further appears from the bill of exceptions that at the time of the breaking into the said store and larceny of said goods, the defendant was in Nebraska City, and had been there for about two weeks. That during said time he took his meals at the restaurant of William Ince, and roomed in the Barnum House. That he was without any known occupation, but claimed to be about to open a shooting gallery. There was also evidence tending to prove that he was without money.

He continued to take his meals at Ince's restaurant until Friday, April 10, when he disappeared, and was not seen

there again, nor elsewhere in Nebraska City, until he was brought back after his arrest in Chicago.

The only evidence offered on the part of the defense (except of one witness) was that which tended to prove an *alibi*, and it can not be denied that such evidence was very strong. Captain Murfin, Mrs. Wm. Ince, Nettie Knight, and Richard Filbon all testified to facts in relation to the presence of defendant in the dining room of Ince's restaurant between the hours of five and seven o'clock on the evening of the larceny, which, if true, and no doubt is cast upon the honesty or candor of either of the witnesses, and the clock in the dining room indicated the correct time, was sufficient to establish the impossibility of the defendant's being at the scene of the larceny at any time between five minutes before and thirty minutes after six, the whole period of Mr. Calmelet's absence from the store, according to his testimony. But W. W. Brown, a witness on the part of the state, testified that he was on Main street, diagonally opposite to and across the street from Calmelet's store, on the evening in question, twenty minutes or a half an hour before he went to his supper at the Morton House. Saw Calmelet come out of the store, and pass up the street, and that shortly afterwards, and when witness had time to walk about three-fourths of a block, he met defendant and passed him on the sidewalk, diagonally and on the opposite side of the street from Calmelet's store. That defendant was alone, and looking in the direction of Calmelet's store. Witness testified that within twenty-five minutes or half an hour from the time of his meeting defendant on the sidewalk, as above stated, he heard, at Reed's drug store, of the robbery of Calmelet's jewelry store. Witness testified that the time when he saw Mr. Calmelet come out of the jewelry store and pass up street was not earlier than five minutes before, nor later than five minutes after six o'clock, and though he was subjected to a searching cross-examination, none of his statements were in the least shaken.

I have stated the substance of the testimony for and against the *alibi* for the purpose of introducing the instructions prayed by the defendant and refused by the court, which refusal is urged as error. The instructions prayed were as follows :

"No. 6. The jury are instructed that the burden lies on the state to prove the falsity of the defendant's *alibi* beyond a reasonable doubt."

"No. 9. The jury are instructed that the presumption arising from the possession of stolen property is completely removed by the proof of an *alibi* for defendant."

"No. 10. The court instructs the jury that while possession of stolen property recently after the theft, if unexplained, is a circumstance tending to show the guilt of the possession, still, in this case, if the jury believe from the evidence that the defendant at the time of the commission of the larceny was at the restaurant of William Ince, and not at the place of said larceny, this is a satisfactory account of his possession of the property, and removes every presumption of guilt growing out of such possession."

The following instructions bearing on the point of defendant's evidence tending to prove an *alibi* were given:

"4. It is a rule of evidence in trials for the larceny of goods that the finding of the stolen goods in the exclusive possession of the accused very recently after the larceny was committed, is presumptive evidence that he stole them, and in this case if the goods mentioned in the indictment were stolen, and shortly after the larceny they or a portion of them were found in the exclusive possession of the accused, the presumption arising from such possession is that the defendant stole them. But the defendant having introduced evidence to show that he at the time of the larceny was at another place and could not have perpetrated the crime, the burden still rests upon the prosecution to prove the defendant did commit said larceny and is guilty beyond a reasonable doubt."

No. 1 of instructions given as prayed by defendant: "Where a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an alibi."

"No. 2. One of the defenses interposed by the defendant in this case is what is known as an alibi, that is, the defendant was at another place at the time of the commission of the crime, and the court instructs the jury that such defense is as proper and as legitimate if proved as any other, and all evidence bearing upon that point should be carefully considered by the jury, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed they should give the defendant the benefit of the doubt and find him not guilty."

"3. As regards the defense of an alibi the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged."

"4. The court further instructs the jury that if they believe from the evidence that at the time of the alleged larceny and at the hour that the crime was committed the defendant, McLain, was at the restaurant of William Ince, as testified to by some of defendant's witnesses, and was not present at the scene of such larceny at the time of its commission, then you must acquit the defendant."

"5. The jury are instructed that if you entertain any reasonable doubt as to whether or not the defendant, McLain, was at Ince's restaurant or at the scene of the larceny, Calmelet's store, at the time the larceny was committed, then it is your sworn duty under the law to give the benefit of the doubt to the defendant and acquit him."

"7. The jury are instructed that if you should entertain a reasonable doubt as to the defendant's guilt he should be

acquitted, although the jury might not be able to find that the alibi was fully proved.

"8. The jury are instructed that the fact that the defendant may not be able to show how or where he acquired possession of the property alleged to have been stolen is by no means conclusive of his guilt, but merely raises a presumption of guilt, which he may rebut by proof that at the time of the commission of the offense he was some distance from the place of taking."

These instructions presented to the consideration of the jury the defendant's evidence of his *alibi* in a light as favorable to him as the law would justify the court in doing, and indeed I think the court went rather too far in that direction. The most that could be required was, that the jury be told that the burden of proof did not shift to defendant upon the question of *alibi*, and that if upon all the evidence, including that for and against the *alibi*, there was a reasonable doubt of his guilt, they must acquit him. This they were told in effect so often as to almost infringe upon the rule which forbids a court in instructing a jury to give undue prominence to particular facts or a particular branch of the case. See *Campbell v. The People*, 109 Ill. R., 565.

Plaintiff in error, in the brief of counsel, also makes a point upon the giving of No. 5 of instructions given on behalf of the state, which is as follows:

"No. 5. If the evidence satisfies you that said goods were stolen, then, in passing upon the question of the defendant's guilt or innocence, you should consider the evidence as to the goods having been found in the possession of the defendant as well as the evidence as to defendant's opportunity or want of opportunity to commit the larceny, his conduct at or about the time of the larceny and prior and subsequent thereto, and what, if anything, he may have said respecting the larceny, as well as all the attending circumstances as shown by the evidence admitted in the

case." Counsel do not point out in what respect the giving of this instruction was prejudicial to the plaintiff in error, nor do I perceive in what light it can be held to be error, much less prejudicial error.

A considerable part of the brief of counsel is devoted to a discussion of the question of the admissibility of confessions made by the accused while under arrest, and induced by those having him in arrest by threats of punishment or promises of favor. While I am inclined to agree with counsel in the main in what they say as to the law on that subject, I am unable to see its applicability to the case at bar. Certainly no witness has testified to any confession made by the accused. The giving of information by him by means of which one of the stolen articles was found cannot be regarded as a confession of guilt, and it is very clear from the whole case that it was not so intended. Neither does it appear that the police officers sought to elicit a confession of guilt from him that would secure his conviction. They did seek to induce him to divulge facts which might lead to their securing the balance of the stolen property, and probably of his associates in the crime, yet with but little success. The watch and chain which he had pawned in Chicago he knew they would find anyhow, so he gave the name of the shop where it might be found; but as to what had become of the balance of the plunder, or who had assisted him in the commission of the robbery and shared its fruits with him, or, indeed, that he had any part in its commission or received the goods from some other party knowing that they had been stolen, or otherwise, he made no sign.

It appears from the bill of exceptions that in opening the case to the jury, on the part of the state, Mr. Strode, district attorney, as a part of his remarks, referring to the apprehension of the defendant, used the following language: "The policeman knew his reputation to be that of a common thief." Upon the attention of the court being

called to these remarks by the counsel for defendant, the court admonished the district attorney that he "should not say that." And upon counsel for defendant demanding the court to instruct the district attorney "that it is improper to state what this man's reputation was," and said, "We object to anything as to this man's character or reputation being said," the court said, "You cannot prove that in the first instance, I suppose; till they show good character you cannot prove bad character." Whereupon the district attorney said, "I will desist from commenting." Again, in his closing remarks in summing up to the jury, the district attorney used the following language: "I trust the jury will do what is right, and I will be satisfied, and the people will be satisfied. But if you acquit there is no appeal for the state; that ends it as far as the state is concerned; while if you convict, and an injustice is done, the defendant has a right to appeal to the supreme court, who, if it is wrong, will reverse the case and give him a new trial." Whereupon counsel for defendant said, "I ask that that be taken down, and we except to it."

Also, it appears that Hon. F. J. Ransom, who assisted the district attorney, and who also summed up on the part of the state, in the course of his speech said, while commenting on the testimony of the witness Dennis Kay, who arrested the defendant in Chicago: "He suspected there was some crooked work, because he knew him to be an old thief." Upon the attention of the court being called to these remarks, and objection made to them by counsel for defendant, Mr. Ransom claimed that he was commenting on the testimony. Counsel for defendant asked that the notes of the reporter be read, which was done, and it was found that the testimony of the witness Kay as to the defendant being an old thief had been stricken out. Whereupon counsel for defendant asked the court to instruct the jury that what counsel had said should have no weight with them, and asked the court to instruct counsel not to

refer to that any more, for it is not in evidence, and it is improper to do so, which, according to the bill of exceptions, "is accordingly done."

Again, in the course of his remarks, Mr. Ransom said: "He has not called any witness here, nor accounted for the property." Watson: "I object to counsel stating anything of that kind, not accounting for the property." Ransom: "I say that a person found with stolen property in his possession is bound to account for it so as to change the burden of proof." Watson: "We object."

Objection overruled, and defendant excepted.

The above is claimed to be misconduct on the part of the district attorney and assistant counsel, and a reversal of the judgment is claimed for that reason.

Similar questions have often come before this court, and its rulings have been almost, if not quite, uniform upon them. The case of *Bradshaw v. The State*, 17 Neb., 147, is quite in point as to all objections of this character in the case at bar, except the last objection raised to the remarks of assistant counsel Ransom. In that case, in the opinion by Judge Reese, the court say: "The supreme court in the exercise of its appellate jurisdiction in cases of this kind is limited to the correction of the errors of the district court. Before a case can be reversed and a new trial ordered it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this state is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language and a ruling upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument, an exception to the decision can be noted by a bill of exceptions showing the language used, the objection, ruling of the court, and exceptions to the ruling can be presented to this court for decision. If

the court sustains the objection, and thus condemns the language and requires the attorney to desist and confine himself to the evidence in the case, no injury is suffered by the accused." In the matters which we are now considering there was but one ruling of the court adverse to the defendant. In that the court sustained assistant counsel Ransom in stating to the jury, "He has not called any witness here nor accounted for the property," and "I say that a person found with stolen property in his possession is bound to account for it so as to change the burden of proof."

The first proposition was one of fact. If counsel should be understood as meaning that the accused had called no witness to testify for him at the trial, the statement was not true in point of fact, for he had called several. But such could not have been the intent of the language, but rather that the defendant had called no witness to testify as to how he came into the possession of the goods. In this sense it was true, and I think legitimate matter to call the attention of the jury to. The other words used by him, while not stating the proposition as fully and clearly as would be required in an instruction by a court to a jury, yet did state the law substantially correct; and as nearly technically so as should be required in a forensic address. There can be no doubt, as a general proposition of law, that the exclusive possession of goods recently stolen is sufficient to put an accused person upon his defense. The remarks of counsel in summing up must be construed in reference to the evidence in the case in hand, and in that view I think they were unobjectionable.

The only remaining point to be examined is that numbered six in the petition in error. "That the verdict is not sustained by sufficient evidence and is contrary to law."

It is not questioned that the goods described in the indictment were stolen at the time and place therein stated. Nor that at that time the accused was boarding at one place and rooming at another, all within a block or two of the

scene of the larceny. It is in proof on both sides that as early as the next morning after the larceny the plaintiff in error knew that he was suspected as having committed it. One of his own witnesses testified that on the next Friday, six days after the larceny, he disappeared from his boarding house without notice of his intended departure, and three days from that time the plaintiff in error was arrested in a pawnshop in Chicago, four hundred miles away, with about half of the stolen property on his person, having already pawned a valuable gold watch and chain, part of said stolen property, for some ten or fifteen dollars.

There was also evidence tending to prove that at the time of the larceny the defendant had been in Nebraska City for about two weeks, without occupation or visible means of support. That he was talking of building and operating a shooting gallery, but was unable to raise the sum of five dollars required by the carpenter as advance payment before commencing the work.

The only defense sought to be made by the accused was that of alibi. That at the time, to-wit, between five minutes before six o'clock and thirty minutes after six of the afternoon of Saturday, the 5th day of April, 1884, he was, all of the time, in the dining-room of William Ince's restaurant. This is sworn to by four witnesses; and it seems to me that while this defense rested entirely upon the accuracy of the restaurant clock, and the fact that it had not been tampered with on the evening in question, yet, those two propositions granted, the alibi was as fully proven as well as could be. Yet there was conflicting evidence. One witness, who carried a watch and had occasion to consult it with reference to taking his wife to supper at the hotel, and did consult his watch at the very time in question, swears positively to having seen the accused on the street near the scene of the larceny about the time when the larceny must have been committed, at the time when the other four witnesses swear to his having been on the

sofa playing with Mrs. Ince's children in the restaurant. In such cases it is the province of the jury, and always a disagreeable and unwelcome duty, to decide which statement is the truth. And in arriving at this decision many other things beside the relative number of witnesses on either side may be considered by them, and when their finding follows the consistent evidence of one intelligent and unimpeached witness it cannot be said to be unsustained by the evidence.

In passing upon the prisoner's defense of alibi I think the jury had the right to consider all the evidence in the case; that of the finding of a part of the stolen property on the person of the accused in a shop where stolen property of that description is usually disposed of, in a distant city, nine days after the robbery, as well as that confined to his actual presence at the restaurant on the one hand, or on the street near the scene of the larceny on the other near the precise point of time when the larceny must have been committed. And looking at the whole of the evidence, I think that the verdict is not only sustained by the evidence, but for the jury to have found otherwise would have been to ignore both reason and the teachings of experience.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

LEWIS TESSIER, PLAINTIFF IN ERROR, V. LOCKWOOD
ENGLEHART & CO., DEFENDANTS IN ERROR.

1. **Attachment: AFFIDAVIT IN LANGUAGE OF STATUTE.** The grounds or causes for the issuance of an order of attachment, being divided and separated into nine groups or subdivisions in the section of the statute providing therefor, each group or subdivision constitutes but one ground or cause, and the whole of either one of such groups or subdivisions may be stated in the language of the statute in an affidavit for an order of attachment, although it contains more than one distinct allegation separated from each other by the disjunctive conjunction *or*. When more than one of such groups or subdivisions are used in an affidavit they should be united by the conjunction *and*.
2. ———: ———: **SUFFICIENCY.** Where from the record before the court it appears that the person who made the affidavit for an order of attachment is the plaintiff or one of several plaintiffs, the attachment will not be quashed, although the affidavit contains no direct allegation that the affiant is the plaintiff or one of the plaintiffs.
3. ———: **PART OF DEBT NOT DUE.** It is not a fatal objection to an attachment that it may be deducible from an examination of the petition or bill of particulars that some part of the amount stated in the affidavit for attachment is not yet due.
4. ———: **FAILURE OF ORDER TO STATE CLAIM OF PLAINTIFF NOT FATAL.** In an action for goods, wares, and merchandise, it is not a fatal objection to an order of attachment issued therein that the same fails to state the plaintiff's claim, so as to show whether or not the defendant is entitled to the maximum of exemption against the same.
5. **Set-off.** A claim on the part of a defendant which he will be entitled to set off against the claim of a plaintiff must be one upon which he could at the date of the commencement of the suit have maintained an action on his part against the plaintiff. *Simpson v. Jennings*, 15 Neb., 671.
6. **Foreign Judgment.** The judgment of a foreign court against a person domiciled in this state, where it appears by the record that no personal service of process was had upon such defendant, and that he made no appearance to the action, will not have full force and effect in this state.

18	167
23	103
24	188
26	452
18	167
38	523
18	167
44	76
18	167
50	370
18	167
58	48

ERROR to the district court for Gage county. Tried below before BROADY, J.

T. D. Cobbey, J. E. Cobbey, and W. H. Ashby, for plaintiff in error, on insufficiency of affidavit for attachment, cited: *Wray v. Gilman*, 1 Miles, 75. *Culbertson v. Cabeen*, 29 Tex., 247. Maxwell's Justice, 1883 Ed., 185. Maxwell's Pl. & Pr., 3d Ed., 499-500. *Stacy v. Stichton*, 9 Iowa, 399. *Kigel v. Schrenklenin*, 37 Mich., 174. Drake Attachment, § 104. *Wray v. Gilmore*, 1 Miles, Pa., 75. *Barnard v. Sibre*, A. K. Mar., 580. *Willis v. Lyman*, 22 Tex., 268. On debt not due, cited: *Cross v. McMackin*, 17 Mich., 511. Drake, § 107. On foreign judgment, cited: *Davenport v. Barnett*, 51 Ind., 329. Story Conf. Laws, 8th Ed., 821. *Mason v. Butchell*, 101 U. S., 638. *U. S. v. Denny*, 6 Biss., 501. *Child v. Powder Works*, 45 N. H., 547. *McGilvray v. Avery*, 30 Vt., 538. *Barnes v. Gibbs*, 31 N. J. Law, 320.

Burke & Prout and Hazlett & Bates, for defendants in error, cited: *Ellison v. Tallon*, 2 Neb., 15. *Tallon v. Ellison*, 3 Neb., 73. *Hilton v. Ross*, 9 Id., 409. Drake, §§ 102, 418. *Tessier v. Crowley*, 16 Neb., 369. *King v. Vance*, 46 Ind., 246. *Maxwell v. Stewart*, 22 Wall., 77. Waples Attachment, § 3, and cases cited in note 1.

COBB, CH. J.

This action was commenced by the defendants in error against the plaintiff in error in the district court of Gage county, to recover the sum of \$1,963.19, claimed to be due from plaintiff in error to defendants in error. At the time of commencing the action plaintiffs therein also filed an affidavit and undertaking for an order of attachment against the property of the defendant therein, which was issued, and property attached thereon. The defendant in said

action filed his motion in the district court to dissolve the attachment and discharge the attached property, for reasons therein stated, which motion was overruled. Defendant then filed his answer; a trial was had to a jury, with a verdict and judgment for the plaintiffs. A motion for a new trial being overruled, the defendant brings the cause to this court on error. The first error assigned is, "that the court erred in overruling the motion to dissolve the attachment and discharge the attached property."

The affidavit for the order of attachment is set out in the record as follows:

"STATE OF NEBRASKA, }
" GAGE COUNTY. }

"John A. Johnson, one of the plaintiffs, being first duly sworn, deposes and says that he has commenced an action in the district court of Gage county against Louis Tessier, to recover the sum of \$1,963.19 now due and payable to the plaintiffs from the defendant on account for goods, wares, and merchandise sold and delivered by the plaintiffs to the defendant, at his special instance and request.

"Affiant says that the said claim is just, and he ought as he verily believes to recover thereon the sum of \$1963.19, and that the defendant, Louis Tessier, has assigned, removed, or disposed of his property, or is about to dispose of his property, or a part thereof, with the intent to defraud his creditors, and has rights of action which he conceals." Subscribed and sworn to.

The provision of statute under which the said order of attachment was issued is as follows:

"Sec. 198. The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated: *First.* When the defendant, or one of several defendants, is a foreign corporation or a non-resident of this state; or *Second.* Has absconded with the intent to defraud his creditors; or *Third.*

Has left the county of his residence to avoid the service of a summons; or *Fourth*. So conceals himself that a summons cannot be served upon him; or *Fifth*. Is about to remove his property or a part thereof out of the jurisdiction of the court with the intent to defraud his creditors; or *Sixth*. Is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors; or *Seventh*. Has property or rights in action which he conceals; or *Eighth*. Has assigned, removed, or disposed of, or is about to dispose of his property or a part thereof with the intent to defraud his creditors; or *Ninth*. Fraudulently contracted the debt or incurred the obligation for which suit is about to be brought." * *

Here are nine distinct grounds or causes, upon either of which an order of attachment may issue. Some of them embrace but one allegation, while others, and most of them, are compound in their character; but whether single or compound, each one contains but a single cause of action, and it cannot be urged as an objection to an affidavit or pleading under this section that it contains disjunctive language, as long as it contains but one of said grounds or causes of action, and substantially follows the language of the statute. The *eighth* subdivision or group of grounds or causes of action contains five allegations, separated by the disjunctive conjunction *or*, but in the meaning of the statute it embraces but one ground or cause for attachment. No doubt if the affidavit contained two of the statutory groupings of grounds or causes separated by a disjunctive conjunction, the objection, reasoning, and authorities of counsel for plaintiff in error would be applicable and unanswerable, but such is not the case.

Counsel also object to the affidavit for attachment, because the affiant does not state that he is one of the plaintiffs therein in direct language, but only by way of recital. The statute requires the affidavit to be made by the "plaintiff, his agent, or attorney." Of course where there

is more than one plaintiff it can be made by either one of them, and simultaneously with the filing of the affidavit was also filed the petition in the case, whereby it appears that John A. Johnson was one of the plaintiffs. But it is sufficient for the purposes of this case to say that this objection was never brought to the attention of the district court. Had it been the petition as well as the balance of the record being before the court, it would, doubtless, have been overruled.

The second point is not relied upon in the brief, and will not be considered.

The third objection to the affidavit for attachment is, that it states plaintiffs "ought to recover the sum of \$1,963.19 now due and payable," while the petition shows that there was only \$1,637.88 due at the time of the commencement of the action. This constitutes no objection to the proceedings, but if the plaintiffs in the court below knowingly and willfully attached a greater amount of goods than was necessary to pay their debt then due, with costs and expenses, they would probably be liable in damages.

The fourth objection is, that the plaintiff's claim is not stated in the order of attachment as it is in the affidavit. The contention of counsel is, that the statute requires the order of attachment to contain a statement of the nature as well as the amount of the plaintiff's claim, to the end that the sheriff may know whether the defendant is entitled to the maximum exemption against the same or not. This view of the statute is certainly ingenious and worthy of consideration. But I do not think that the defendant in the case at bar can take advantage of any failure of the order to state the nature of plaintiff's claim even if counsel's view of the statute be adopted. The most that could be said of it is, that by failing to state the nature of the plaintiff's claim they admit that defendant is entitled to the maximum exemption.

The fifth point of error is, that the court below refused to allow defendant to prove his counter-claim, which consisted wholly of a claim for damages caused by the taking of the defendant's goods on the order of attachment issued in the case on trial, and the breaking up of defendant's business, which resulted therefrom. In the pleading itself the defendant does not designate it as a counter-claim, but rather as a defense to plaintiff's cause of action; but upon the trial, as appears by the bill of exceptions and in the brief, it is claimed to be a counter-claim.

The statute defines a counter-claim as follows: "The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Sec. 101, Code of Civil Procedure.

Now "the contract or transaction set forth in the petition as the foundation of the plaintiff's claim," and "the subject of the action" in the case at bar is the purchase and sale of goods at sundry times between July 19th and December 20th, 1882, both inclusive. The counter-claim is based upon matters and transactions claimed to have occurred subsequently to the commencement of the suit in March, 1883.

In the case of *Simpson v. Jennings*, 15 Neb., 67, we had occasion to examine the subject of counter-claim, and upon due consideration, and upon authorities there cited, the law was stated as follows: "A claim on the part of a defendant, which he will be entitled to set-off against the claim of a plaintiff, must be one upon which he could at the date of the commencement of the suit have maintained an action, on his part, against the plaintiff."

The sixth point urged by plaintiff in error in the brief of counsel arises upon the refusal of the court below to

admit in evidence upon the trial the transcript of a judgment rendered by the superior court of Cook county in the state of Illinois.

The third plea or paragraph of the defendant's answer is in the following words: "The defendant for a third defense to this action further alleges that the plaintiffs herein did, on the 9th day of May, 1883, in the superior court of Cook county, Illinois, recover a judgment against the defendant herein for the sum of nineteen hundred and sixty-three and $\frac{1}{100}$ dollars, upon the same cause of action set forth in plaintiff's petition, and upon which plaintiff's cause of action is founded, and said judgment remains a valid judgment unsatisfied and unappealed from," etc.

This defense was demurrable in not alleging either that the superior court of Cook county, Illinois, is a court of general jurisdiction, or that it had jurisdiction of the subject matter of said judgment, or of the person of said defendant. Said court being a foreign tribunal, in the sense of the law and authorities, such allegation was necessary, and its absence could be taken advantage of either by demurrer or by objection to the introduction of testimony under that paragraph of the answer, and perhaps in other ways.

Upon examination of the record offered, it appears that while the judgment is in due form of a personal judgment, yet there was no personal service on the defendant, nor indeed any proof of constructive service, which either this or the district court could recognize. Yet, if it be conceded that the court rendering the judgment offered in evidence was a court of general jurisdiction, there having been no personal service on the defendant, he being domiciled in another state than that of the court, and having made no appearance in the action, the judgment in whatever form could have no extra territorial effect either as evidence or otherwise. See Story on Conf. of Laws, 8 Ed., note 6, pp. 809 and 810, and authorities there cited.

Lansing v. Johnson.

The admission of the record offered in evidence was therefore properly refused.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JAMES F. LANSING, PLAINTIFF IN ERROR; v. P. P. JOHNSON, DEFENDANT IN ERROR.

Verdict Sustained. The verdict of the jury being consistent with the instructions of the court and the evidence, the judgment thereon will be affirmed, there being no error in the instructions.

ERROR to the district court of Lancaster county. Tried below before POUND, J.

Sawyer & Snell, for plaintiff in error.

Marquett, Deweese & Hall, for defendant in error.

REESE, J.

This action was for the recovery of \$575 alleged to be due plaintiff in error from defendant in error as commission due for services as a real estate agent, in negotiating the exchange of certain real property. The jury returned a verdict for the sum of two hundred dollars, for which judgment was rendered. Plaintiff in error not being satisfied with the amount of his recovery moved for a new trial, and upon his motion being overruled by the district court he alleges error and brings the case into this court for review.

The principal question in the case is, whether plaintiff in error was entitled to recover the usual commission fee charged by real estate agents, or whether his recovery

should be limited to what his services were worth. An instruction was asked by plaintiff in error that if the jury found for him they should allow the full customary and usual commissions charged for making such sales, where there was no agreement as to the amount to be paid. The instruction asked was refused, but an instruction was given as follows:

"If you find for the plaintiff then he is entitled to recover such sum as you believe, from the evidence, his services were reasonably worth according to the usual and customary mode of charging for such services among real estate agents at the time and place such services were rendered, together with interest on such sum at the rate of seven per cent per annum from the time the same was done."

As applied to the case at bar we can not see but that this instruction was correct. And, indeed, it seems to be in accord with the views of plaintiff in error. The jury are told to allow the reasonable worth, according to usual and customary charges for such services among real estate agents. In other words the jury were directed to consider such custom in arriving at the worth of the services. This was correct. 2 Sutherland on Damages, 451. *Ham v. Goodrich*, 37 N. H., 185.

But it is insisted that, conceding the instruction to be correct, the verdict is contrary to the weight of evidence as well as contrary to the instruction of the court.

Were defendant in error the complaining party it might with some show of reason be contended that the verdict was against the weight of evidence, yet as the testimony was conflicting there was sufficient perhaps to sustain it, but we can see no just ground for complaint on the part of plaintiff in error. The services rendered, even if under employment, were comparatively light, and sustained a small proportion to the whole of the labor in perfecting the trade. The jury might, and perhaps did, conclude that,

Deirks v. Wielage.

upon the basis of commissions usually charged, plaintiff had not rendered a service which would entitle him to more than the amount given. Substantially all that plaintiff could do in the matter of making the exchange of the property traded was to bring the parties together, or rather inform them of the existence of each other. But it is clearly shown that this was done by another agent before the alleged employment of plaintiff.

Upon the whole case we think plaintiff has no just ground for complaint, and that the verdict and judgment are fully as liberal as he could be entitled to in any view of the case.

The judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**ANTON DEIRKS AND DEITRICK DEIRKS, PLAINTIFFS IN
ERROR, V. H. H. WIELAGE, DEFENDANT IN ERROR.**

1. **Herd Law.** A person taking up stock for trespass upon cultivated lands, under the provisions of the herd law of 1871, acquires no lien upon such stock unless he complies substantially with the provisions of the act. *Bucher v. Wagner*, 13 Neb., 424.
2. —: **REPLEVIN OF STOCK.** Where the taker-up of trespassing stock, upon the application of the owner so to do, refuses to appoint an arbitrator for the purpose of ascertaining the damage done, after an arbitrator has been selected upon the part of the owner, but demands the payment of a specific sum of money, he thereby loses his right to the possession of the stock, and the owner may maintain replevin therefor.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Charles E. Magoon, for plaintiffs in error.

J. E. Philpott, for defendant in error.

REESE, J.

This cause was an action of replevin for the possession of a bull belonging to defendant in error, plaintiff below. The trial resulted in a verdict and judgment in favor of the plaintiff in the action, and the defendant, as plaintiff in error, brings the case into this court for review by petition in error.

The facts in the case may be briefly stated as follows: The animal in question escaped from the premises of defendant in error and broke into and trespassed upon the pasture land of plaintiff in error, where his cattle were, and being found there by plaintiff in error was detained, by being herded away from the other cattle and within the enclosure. Notice was verbally given to defendant in error of the fact, and he at once went to the premises of plaintiff in error for the purpose of removing the animal to his home, but plaintiff in error demanded more compensation than he was willing to pay. He then procured an arbitrator and returned, and requested plaintiff in error to select his arbitrator, which plaintiff in error declined doing, saying he wanted five dollars for trouble and labor in keeping the animal away from his herd, and that the question of damages could be settled only after it was ascertained how much damage had been done by reason of the bull—which is denominated a “scrub”—getting with his cows. Defendant in error then instituted the action.

The third instruction given by the court to the jury at the request of defendant in error was as follows:

“You are further instructed that if you shall find from the evidence that the plaintiff went to the defendants and requested them to name an arbitrator to settle the amount

they should receive for any injury or damages done by said bull, and then on his part offered and named such an arbitrator, then it was the duty of the defendants in a reasonable time to name such an arbitrator and to submit their said differences to such arbitrators; and that in case you shall further find from the evidence that the defendants failed and neglected to appoint and name an arbitrator on their part to act with an arbitrator named by the plaintiff, or if you shall find from the evidence that the defendants, upon a request to them by plaintiff to name and appoint an arbitrator to act with such an arbitrator named by him, wholly refused so to name or appoint such an arbitrator, and demanded that plaintiff should pay them a certain sum fixed by them as such damages and compensation, then the plaintiff was at once entitled to the possession of said bull. The defendants were not thereafter entitled to hold possession thereof, and you should find thereupon for the plaintiff." The giving of this instruction is alleged as error.

We cannot hold the giving of the instruction to be erroneous. Assuming, as we may, perhaps, that plaintiff in error was entitled to a lien upon the trespassing animal for the amount necessary to compensate him for the detention and care necessarily required, yet that lien was a statutory one, and depended upon a substantial compliance with the requirements of the law for its continuance and enforcement. He was required to give the written notice of the capture, amount of damage, and the name of his arbitrator. Comp. Stat., Ch. 2, Art. III. This was waived by defendant in error by the selection of his arbitrator and requesting plaintiff in error to select his, which plaintiff in error refused to do. It was clearly his duty to do so if he wished to perpetuate his lien.

In *Bucher v. Wagoner*, 13 Neb., 424, which we think is decisive of this case, it was held that a substantial compliance with the statute was necessary, otherwise no lien was acquired. In that case Judge MAXWELL, in writing the

opinion of the court, says: "But in this case the person taking up the stock refused to submit the matter to arbitration to ascertain the amount of damages, in fact refused to select an arbitrator or submit the matter to adjudication. He made an arbitrary demand for damages, and refused to take the necessary steps to ascertain the actual amount." And again it is said: "But the person taking up stock acquires no lien thereon unless he complies substantially with the terms of the statute, and this the defendant wholly failed to do."

But it is claimed that defendant in error cannot complain that plaintiffs in error refused to appoint an arbitrator to ascertain the damage done, for the reason that a reasonable length of time was not given them in which to make the selection of an arbitrator. However that might have been, had plaintiff in error required further time, it is quite clear that the rule contended for can have no application to this case, for plaintiff in error refused to make such appointment. It would have accomplished nothing to wait longer when plaintiff in error had already decided he would make no selection. It is true his reason for declining was that it was impossible to ascertain the damages done to his cows at that time. But this does not aid the matter. He could not legally keep the animal there until that fact could be ascertained, and therefore it would seem that he would have to resort to another remedy for damages of that character. It is evidently the purpose of the law that the taker-up of stock shall have a lien for only such damages as could be ascertained by arbitrators to be immediately appointed.

We think the ruling of the district court was correct, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	180
26	638
18	180
32	301

**ANDREW NELSON, PLAINTIFF IN ERROR, V. ANNA K.
JOHANSEN, DEFENDANT IN ERROR.**

1. **Instructions to Jury.** When upon a jury trial an instruction is asked by which it is sought to cover the whole case made by the party asking it, all the essential elements of the case should be embodied in the instruction, otherwise it is not error to refuse it.
2. **Guardian and Ward: LIABILITY OF GUARDIAN FOR NEGLIGENCE IN CARE OF WARD.** Where an infant plaintiff of the age of eleven years resided with the defendant, and where it was his duty to keep such infant properly clothed, if she left his house on a very cold day to return to her own house a mile and a half distant, and defendant had, in violation of his duty and through negligence, failed to provide sufficient clothing, and she was by reason thereof badly frozen, the defendant would be liable for such damages as were chargeable to his want of care.
3. **Verdict Sustained.** When the testimony is conflicting a verdict will not be set aside as against the weight of evidence, unless such verdict is clearly and manifestly wrong.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

C. A. Baldwin, for plaintiff in error.

John C. Cowin, for defendant in error.

REESE, J.

Plaintiff in error having failed to appear in this cause, and having filed no brief, the cause was submitted by defendant in error without brief or argument, according to the provisions of rule four of this court, in force at the time the same was filed.

While it could not be expected that, without the aid of briefs and arguments of counsel calling the attention of the court to the errors complained of, we can be able to give

the case that critical examination which it would otherwise receive, yet we devote to it sufficient attention to examine the questions presented by the record, and ascertain whether such errors appear of record as to require the reversal of the case.

The action in the district court was brought by defendant in error by her next friend, she being a minor. The petition alleges that in the year 1880, when she was of the age of ten years, her father, by agreement with defendant in error, sent her to the home of defendant in error to reside with and work for his family until the 5th day of December, 1880, and that at that time and upon that day—the weather being very cold—plaintiff in error sent her home across the prairie, a distance of about one mile and a half, so poorly and thinly clad, and so exposed to the inclement weather, that on her way she was badly frozen, so that she was for a long time sick, confined to her bed and suffered great pain, etc., and whereby she was greatly damaged, to-wit, in the sum of \$5,000, for which she asked judgment.

The answer of plaintiff in error, after admitting the fact of defendant in error residing with him, and leaving him at the time alleged, denies all improper treatment of defendant in error on his part; alleges that she came to live with him for the term of three years, but, at the instigation and by command of her parents, left him on the day named without any knowledge on his part as to what clothing she wore, and while he was from home; that she was provided with suitable clothing, some of which she had left at her own home; and pleading such other facts as if established by proof would exonerate him from any charge of cruel or improper treatment of defendant in error. The trial resulted in a verdict and judgment in favor of defendant in error for the sum of two hundred and fifty dollars.

The errors assigned in the petition in error are, that the court erred in giving certain instructions referred to by numbers, and in refusing others which are designated in-

the same way. Also that the verdict is contrary to law, and is contrary to and against the weight of the evidence in the case. Other general assignments are made in the usual statutory form.

As to the first assignment of error, that the court erred in giving the instructions, six in number, referred to, it is sufficient to say that we have examined them, and do not detect any misstatements of the law or improper directions to the jury.

The instructions refused, and of which refusal complaint is made, are as follows :

"3. If the jury are satisfied from the evidence that at the time the plaintiff, Anna K. Johansen, left the home of the defendant to go home, on December 5th, the defendant was not at home, and did not know when he left his home that she was going to leave his place that day, and the defendant did not send her away, the plaintiff can not recover, and your verdict must be for the defendant."

"4. The parents of Anna being her natural guardians had the right to direct and control her actions; and if the jury shall find from the evidence that on the day preceding the day she left the defendant's her parents told her to come home, and she communicated that to the defendant, and that he thereupon told her that he would rather she would not go, but that he had no power to stop her going, that he did not want her to go, and that she afterwards did leave without defendant's knowledge, and by reason of doing so took cold, and was sick, the defendant would not be liable therefor."

"5. The jury are instructed that if the plaintiff, at the time referred to, left the defendant's by the direction of her parents and against the advice of the defendant, and that by reason of her so going she took cold, and was made sick, the defendant would not be liable for negligence in permitting her to go home under these circumstances under the issues made by the pleadings in this case."

The petition alleged, and the testimony on the part of plaintiff tended to show, that the suffering of plaintiff was caused by the want of proper clothing for the purpose of protecting her from the rigor of the weather; that it was cold and she was very thinly clad. Her age at that time was about eleven years. So far as the duty of plaintiff in error toward her was concerned he stood in the relation of her parent, and in view of her want of experience and knowledge it was his duty to see that she was properly clothed. If he failed in this, through negligence, he would be liable for the consequences. By an examination of the foregoing instructions it will be seen that they fail to embody this important element in this case. Even if she had gone home without his knowledge, and by the express command of her parents, yet it would not relieve him from his duty to exercise proper care over her, and to see that she was properly and as near as might be comfortably clad. For this reason we think the instructions were properly refused.

It is next alleged that the verdict was against the weight of evidence, and was not supported by sufficient evidence.

Upon this branch of the case it is sufficient to say that we have carefully read over and examined all the testimony introduced upon the trial, and find it conflicting and quite difficult to harmonize. In fact there was a sharp conflict between the testimony introduced on the part of defendant in error and that presented by plaintiff in error. If the jury believed the testimony of the witnesses produced by the defendant in error, there was sufficient to sustain the verdict. As to the weight of the testimony they were the judges, and the verdict would not be set aside unless clearly and manifestly wrong.

We are unable to discover any error in the record, and the judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PHOENIX INSURANCE CO., PLAINTIFF IN ERROR, V. JOHN LEMKE, DEFENDANT IN ERROR.

1. **Justice of Peace: ACTION ON NOTE.** Where an action is brought on a promissory note before a justice of the peace, and the note is copied by him into his docket and a summons issued thereon, it is a sufficient bill of particulars.
2. ———: **JUDGMENT.** Where the justice has in his possession the instrument on which the action is brought, and there is no affidavit of the defendant made and filed with him denying its execution, nor any defense made to the action, the justice may render judgment on such instrument, although the plaintiff fail to appear.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

Marquett, Deweese & Hall, for plaintiff in error, cited: *Wells v. Turner*, 14 Neb., 445.

J. E. Philpott, for defendant in error, cited: Civil Code, §§ 951, 952. *McCormick v. Thompson*, 10 Neb., 491.

MAXWELL, J.

This action was brought before a justice of the peace upon a promissory note, of which the following is a copy:
“\$20.00.

“On the first day of April, 1884, for value received, I promise to pay to the Phoenix Insurance Company of Brooklyn, N. Y. (at their office in Chicago, Ill.), or order, twenty dollars, in payment of premium on policy No. 095,-866 of said company. If this note is not paid at maturity said policy shall then cease and determine, and be null and void, and so remain until the same shall be fully paid and received by said company. In case of loss under said policy this note shall immediately become due and payable,

and shall be deducted from the amount of said loss. It is understood and agreed that this note is not negotiable.

"Dated at my farm this 3d day of April, 1883.

"JOHN LEMKE.

"Witness, J. A. CARPENTER."

The note was filed with the justice as a bill of particulars. A summons was issued, which was returnable on the 6th day of October, 1883. On the return day the defendant below appeared by attorney and obtained a continuance until the 11th of October, 1883, at 2 o'clock P.M. At 2 o'clock P.M., October 11th, 1883, the attorney for Lemke appeared and moved to dismiss the action, for the following reasons:

1st. Because the plaintiffs had filed no bill of particulars of their demand.

2d. Because the said plaintiffs had not filed a bill of particulars against the defendant.

3d. Because the said plaintiffs did not appear at 2 o'clock P.M.

The motion was overruled, and the defendant refusing to appear further, judgment was rendered in favor of the plaintiff for the sum of \$20 and interest and costs. The defendant took the case on error to the district court, where the judgment of the justice was reversed and the cause retained for trial.

The question here involved was before this court in *Wells v. Turner*, 14 Neb., 445, in which it was held that where a promissory note was left with a justice of the peace, who copied the same into his docket and issued summons thereon, it was a sufficient bill of particulars. It was also held that a justice having in his possession the evidence of indebtedness upon which the action is brought may render judgment on such evidence in the absence of any of the parties. This, we think, is a correct statement of the law. The statute requires a defendant when sued on an instrument purporting to have been made by him, but who controverts

the making of the same, to "make and file an affidavit with the justice of the peace before whom the suit is pending, * * * that such instrument was not made, given, subscribed, accepted, or indorsed by him." Code, § 1100a. If no affidavit is filed in cases where there was personal service, the presumption is that the instrument is genuine, and proof of its execution is unnecessary. In this case no affidavit denying the execution of the note was filed, nor was any defense made to the same. Technical objections are not favored, and will not be sustained unless the matter complained of was prejudicial. But in this case there was no error in the judgment of the justice. The judgment of the district court is reversed and that of the justice re-instated and affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	186
37	387

JOHN C. WATSON, APPELLANT, V. PETER ULBRICH, APPELLEE.

1. **Purchaser at Judicial Sale not Affected by Subsequent Opening of Judgment.** A purchaser in good faith of lands the title of which was acquired through judicial proceedings upon constructive service, will not be affected by the subsequent opening of the decree under section 82 of the Code.
2. ———. Where a decree is vacated under section 82 of the Code, and an answer filed by the defendant denying the facts stated in the petition and praying for a dismissal of the action, the subsequent dismissal of the suit by the plaintiff will not affect the title of a purchaser in good faith while the decree was in full force.

APPEAL from the district court of Otoe county. Heard below before POUND, J.

John C. Watson, for appellant.

Groff & Montgomery, for appellee.

MAXWELL, J.

On the 4th day of June, 1874, one H. H. Gray obtained a tax deed from the treasurer of Otoe county for the north-west quarter of section 34, township 7 north, range 13 east, in Otoe county. On the 8th day of June, 1876, Gray obtained from the treasurer of said county a second tax deed for said land. On the 3d day of February, 1878, a third tax deed for the above described lands was issued to Gray by the treasurer of said county. All of these deeds were duly recorded. The three deeds were made in pursuance of a sale of the land for taxes for the years 1868, 1869, 1870, 1871, and 1872.

In February, 1878, Gray brought an action in equity against Leonard A. Crandall, in the district court of Otoe county, to quiet his title to said land. Crandall being a non-resident of the state an affidavit for publication was duly made and filed, and notice given by publication.

In April, 1878, a decree was rendered wherein the court finds "that he, Gray, has the legal estate in fee simple in and is entitled to the possession of the same; that neither the defendant nor any person since the commencement of this action has any estate in or is entitled to the possession of said real estate or any part thereof; and that the plaintiff ought to have his title and possession quieted as against the defendant as prayed for in his petition herein," and a decree was rendered in favor of Gray, and excluding Crandall from any right, title, or interest in the property.

On the 25th of October, 1878, Gray sold and conveyed the land in question to Holland, and Holland, in December, 1881, in consideration of the sum of \$1,700, sold and conveyed said land to the defendant.

In March, 1883, and within a few days of five years from the date of the decree, and more than a year after Ulbrich's purchase, Crandall served a notice upon Gray, who at that time lived in Wisconsin, of his application to open the decree. On the hearing of the application Crandall was permitted to answer upon payment of costs. He thereupon filed an answer as follows: "Now comes the said defendant, Leonard H. Crandall, and for answer to plaintiff's petition denies that plaintiff is the owner of the northwest quarter of section thirty-four, in town seven, range thirteen east, in Otoe county * * * Denies that he has any valid tax deed to or for said land. Denies that plaintiff ever made any valid purchase of said land for taxes of any year in 1869 or any other years. Denies that there was any valid sale of said land for taxes made in the year 1869, in 1874, or any other years, for the taxes of 1872 or any other year. Denies that any valid deed was ever executed by the treasurer of Otoe county for the tax of any year whatever, or at any time whatever."

Defendant says, "that he is the owner of said land, and asks that plaintiff's bill be dismissed, and that this defendant may have judgment for costs." Gray thereupon dismissed the action without prejudice.

On the 12th day of March, 1883, Crandall conveyed all his interest in the land in question to one James C. Young, who, in December, 1883, conveyed to the plaintiff, who thereupon brought this action, wherein he "prays that each of said deeds as aforesaid made be declared of no effect, and that they be set aside and held for naught, and that plaintiff have his title quieted to said premises, and for such other relief as he may be justly and equitably entitled to." Issues were joined, and on the trial the court found in favor of the defendant, and dismissed the action. The plaintiff appeals.

The principal question to be determined is, whether or not the decree in favor of Gray rendered upon construc-

tive service is valid until set aside. No objection is made to the service or any of the proceedings connected with it. The real estate in controversy was within the jurisdiction of the district court, and that court had authority in a proper case to render the decree confirming the title of Gray.

In *Castrique v. Imrie*, L. R., 4 H. of L., 414-129, Mr. Justice Blackburn says, "We think the inquiry is, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and secondly, whether the sovereign authority of the state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these considerations are fulfilled the adjudication is conclusive against all the world." *Grignon's Lessee v. Astor*, 2 How., 389. *Thompson v. Tolmie*, 2 Peters, 162. *Ballow v. Hudson*, 13 Gratt., 672. *McPherson v. Cunliff*, 11 Serg. and R., 422. *Seward v. Didier*, 16 Neb., 58. *Trumble v. Williams et al.*, ante p. 144. The court, therefore, in this case having authority to render the decree and jurisdiction of the subject matter, its decree is conclusive upon the property until vacated under the statute or set aside.

Section 82 of the Code provides that "a party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear and make his defense; but the title to any property the subject of the judg-

ment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment," etc.

It will be seen that the title of a *bona fide* purchaser acquired while the decree is in full force is protected. This question was before this court in *Scudder v. Sargent*, 15 Neb., 102, and it was held that a *bona fide* purchaser was entitled to protection. A statute of this kind is liable to abuse; and courts should exercise great care to see that the claims which are the subject of the action are well founded; but the decree when rendered, if the court had jurisdiction, is valid until set aside, at least so far as *bona fide* purchasers of the property are concerned. And the order of the court permitting the defendant to answer and make his defense is merely for the purpose of determining the respective rights of the plaintiff and defendant, and does not affect innocent third parties; and the dismissal of the action will not affect their rights. Where the plaintiff, upon an answer being filed, dismisses the action without a trial, and the suit was not founded on a valid claim, but was a mere pretext for obtaining the defendant's property, there is no doubt the plaintiff would be liable for the value of the property so converted. It is unnecessary, however, to consider that question. As the defendant is a *bona fide* purchaser under the decree confirming Gray's title to the property in controversy he is not affected by the subsequent opening of the decree and dismissal of the action. The judgment of the court below is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CLAUS PETERS, PLAINTIFF IN ERROR, V. ALBERT F.
PARSONS, DEFENDANT IN ERROR.

1. **Chattel Mortgage:** DESCRIPTION OF PROPERTY. Where the property was described in a chattel mortgage as "one bay horse eight years old, weight about 1,200," and it was stated in the mortgage that the mortgagor, who was a resident of the county, was "lawfully possessed of said goods and chattels," *Held*, Sufficient to put a purchaser on inquiry.
2. —: **EXECUTION OF MORTGAGE BEFORE PAYMENT FOR CHATTELS.** Where a party purchased horses upon condition that he should pay for them by a certain date, and paid for them at the time agreed upon, but before doing so he executed a chattel mortgage on them, *Held*, That so far as the mortgagee was concerned the title of the mortgagor related back to the date of purchase.
3. **Replevin: DEMAND: COSTS.** Where a defendant is rightly in possession of property the plaintiff must demand possession thereof before bringing an action of replevin, otherwise the defendant will not be liable for costs.
4. —: **ANSWER: GENERAL DENIAL INSUFFICIENT.** A mere denial by the defendant in his answer of the facts stated in the petition is not an assertion of ownership of the property; and does not waive a demand where such demand is necessary before bringing suit.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Charles O. Whedon, for plaintiff in error.

A. W. Field, for defendant in error.

MAXWELL, J.

This is an action of replevin brought by the defendant in error against the plaintiff to recover the possession of "one bay horse, one sorrel horse," in which he claims a special ownership by virtue of a chattel mortgage executed

18	191
26	185
18	191
34	447
18	191
36	734
18	191
41	90
18	191
48	463
18	191
158	330

by one B. E. Glazier. It is alleged in the petition that the defendant (plaintiff in error) "wrongfully detains said property from the possession of this plaintiff," etc. It is also alleged that "prior to the commencement of this action the said plaintiff demanded possession of said property of defendant which said defendant refused and still refuses." The answer is a general denial. On the trial of the cause the jury found that the plaintiff below had a special ownership in the bay horse described in the petition, and that the value of the possession was the sum of \$67.50. A motion for a new trial having been overruled, judgment was rendered on the verdict.

It appears from the evidence that in September, 1882, one Silas M. Clark, of Lancaster county, was the owner of the horses in question, and entered into a contract to sell the same to one B. E. Glazier for the sum of \$160.

To obtain money to pay for them, and for other purposes, Glazier, on the 26th of September of that year, executed a chattel mortgage upon the horses in question and other property to the defendant in error. In this mortgage the horses are described as follows: "One bay horse 8 years old, weight about 1,200; one sorrel horse 10 years old, weight about 1,000." The mortgage contains this allegation: "And I, the said mortgagor, do solemnly declare and represent unto the said mortgagee that I am lawfully possessed of said goods and chattels as of my own property, that the same are free and clear of all incumbrances for obtaining the above money."

The testimony shows that Glazier was at that time residing in Lancaster county, and that the property was within that county. Soon afterwards Glazier traded the horses in question to the plaintiff in error for a span of mules. This action was brought against him to recover the possession of the property; but as he had disposed of the sorrel horse before the action was brought the bay horse alone was taken under the order of replevin.

The first error relied upon by the plaintiff is, that the description of the horses in the mortgage is not sufficient to charge third persons with notice.

In *Jordan v. Hamilton County Bank*, 11 Neb., 503, the description of the property was as follows: "Two mules, one bay and one brown, aged eight years; one bay horse, age five years, one black mare, aged eight years. * * * Nine acres of growing wheat situated on sec. 35, town 12, range 6." This was held to be sufficient. In this case the description of the property in dispute is "one bay horse eight years old, weight about 1,200," of which the mortgagor was possessed. This certainly is sufficient to put a purchaser on inquiry, particularly where the mortgagor appears to have possessed but one horse of that color, and it is shown that Glazier was actually using the horse in question for some time before and at the time he traded the same to the plaintiff in error.

Objection is made that the age of the horse is shown to have been much greater than was stated in the mortgage, consequently calculated to mislead. The testimony tends to show that the horse in question was about twenty years of age. There is no proof that Glazier had been informed by Clark as to the age of the horse when he purchased him, nor that it was a material part of the description. The bay horse is shown to have weighed about 1,200 pounds at the time of the execution of the mortgage, and to have had a star in his forehead and "some white on his feet." As Glazier possessed no other bay horse, the description seems to be sufficient.

2. The testimony tends to show that Glazier made a contract for the purchase of the horses about the 25th of September. Glazier had taken the horses on trial, under an agreement that if he did not pay for them he would pay \$1.50 per day for their use. While in possession of them under this contract the mortgage was executed, the horses not being paid for until the 4th or 5th of the following

October. The plaintiff claims, therefore, that Glazier possessed no interest that was susceptible of being mortgaged, therefore the mortgagee acquires no interest by the mortgage. This position, however, is untenable. While Glazier seems to have executed the mortgage before he was the full owner of the horses, yet he was in possession under a contract which resulted in his acquiring the full title from Clark; in other words, under a contract that if he paid for them by a day named the title was to be complete in him. This payment he made, and it related back to the time the contract was entered into. The mortgage, therefore, is valid.

3. That the defendant below came rightfully into the possession of the property, and as no demand was made upon him for the possession, he should not be taxed with costs. It will be observed that it is alleged in the petition that a demand was made on the defendant below for the delivery of the property before the commencement of the suit. This is denied in the answer, and there is no proof on that point, hence the plaintiff below has failed to that extent to make out his case. In justification of the failure to prove a demand it is said in the brief of the plaintiff that, "in this case the defendant claimed the property as his, denied plaintiff's claim of title and right of possession, and contested every effort made by plaintiff to assert his rights and recover said property," citing *Homan v. Laboo*, 1 Neb., 209. *Homan v. Laboo*, 2 Id., 291. In the case cited in 1 Neb. it is said (pages 209, 210), "Laboo, answering, does not disclaim ownership nor put in the plea of *non detinet*, under which, with the right of Homan established as pledgee, he might have claimed protection from costs as an innocent party upon whom no demand had been made; but beside denying Homan's claim and charging conspiracy between Homan and Ward, he avers that he is the owner of said mules and entitled to the possession of the same."

Traphagen v. Irwin.

In *Homan v. Laboo* the defendant claimed the property as his own. Being his own he would not deliver it to the plaintiff, hence the court held the demand would be of no avail, and was waived. *Johnson v. Howe*, 2 Gilm., 344. *Cranz v. Kroger*, 22 Ill., 74. *La Place v. Aupoix*, 1 Johns. Cases, 407. *Appleton v. Barrett*, 29 Wis., 221. Wells on Replevin, § 373. A mere denial of the plaintiff's right to the possession, however, is not a plea of property in the defendant, and does not waive a demand where one is necessary to entitle the plaintiff to recover. Where a party is in the rightful possession of goods the law presumes that he will deliver the same to the owner upon request, and it will not charge him with the costs of litigating the right to the possession of the same until his holding becomes wrongful, by reason of his refusal to deliver the goods. As there was no demand made in this case before bringing the action, the defendant below is not chargeable with costs. The judgment as to costs is therefore reversed, and judgment for costs is rendered against the plaintiff below. In all other respects the judgment is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WESLEY J. TRAPHAGEN, APPELLANT, v. LIZZIE W. IRWIN AND SARAH J. POUND, APPELLEES.

1. **Conveyance: RECORD: NOTICE.** The record of a conveyance or mortgage is constructive notice to those only who must trace their title through the grantor or mortgagor.
2. ———: ———: ———. A deed or mortgage of real estate executed by a party out of possession and having no record title or apparent interest in the premises is not alone, when recorded, constructive notice of the title or interest of such grantee or mortgagee against one who traces his title from the apparent owner.

Traphagen v. Irwin.

3. **Judgment:** PRACTICE. Leave given the plaintiff to require the defendant to marshal securities and exhaust those upon which the plaintiff has no lien, before resorting to the latter.

APPEAL from Lancaster county. Tried below before MITCHELL, J.

J. R. Webster and *W. E. Stewart*, for appellant, cited: *Wing v. McDowell*, Walk. Ch., 183. *Growning v. Behn*, 10 B. Mon., 385. *Uhl v. Rau*, 13 Neb., 360. *Morse v. Godfrey*, 3 Story, 389. *Gafford v. Stearns*, 51 Ala., 443. *Powell v. Jeffries*, 4 Scam., 391. *Zorn v. R. Co.*, 5 S. C. (Richardson), 97-98. *Manhattan Co. v. Everston*, 6 Paige, 457. *Cary v. White*, 52 N. Y., 141. *Holbrook v. Tirrell*, 9 Pick., 108. *Gilbert v. Bulkly*, 5 Conn., 264. *Fawcetts v. Kimmey*, 33 Ala., 264. *Kearnsing v. Kilian*, 18 Cal., 494. *Holmes v. Trout*, 7 Peters, 213. *Howard v. Huffman*, 3 Head., 563. *Hall v. McDuff*, 24 Me., 312. *Parker v. Kane*, 4 Wis., 12.

Harwood, Ames & Kelly, for appellees, cited: *Edminster v. Higgins*, 6 Neb., 265. *Rhea v. Reynolds*, 12 Neb., 128. *Galway v. Malchow*, 7 Id., 285. *Chicago v. Witt*, 75 Ill., 211. *Fenno v. Sayre*, 3 Ala., 478. *Calder v. Chapman*, 52 Pa. St., 359. *Lightner v. Mooney*, 10 Watts, 407. *Losey v. Simpson*, 3 Stockt. Ch., 246. *Cook v. Travis*, 20 N. Y., 402. *St. John v. Conger*, 40 Ill., 535.

MAXWELL, J.

This is an action to foreclose a mortgage upon lot 7, in block 242, of Lincoln, alleged in the petition to have been executed by William Royce and wife to the plaintiff. The court below found the issues in favor of the defendants and that the mortgage was void as to them. The plaintiff appeals.

It appears from the record that in January, 1882, one B. F. Cobb was the owner of the lot in question, and it is

alleged that on the 20th day of that month he executed a warranty deed for said lot to one William Royce; that thereupon Royce executed a mortgage upon said lot to the plaintiff to secure the sum of \$400, payable three years from date, with interest at 10 per cent. Royce's wife claims she did not sign the mortgage or give her assent to it. Royce, so far as appears, never had possession of the property, and failed to record his deed.

The mortgage to Traphagen was delivered to Cobb, and with the note of Royce accompanying the same was sold to the plaintiff, who was a resident of Illinois. To induce the plaintiff to purchase the same, Cobb, who seems to have kept an abstract of titles, sent an abstract of title of lot 7 wherein the deed from him to Royce is marked as having been recorded January 20th, 1882. Cobb, at this time and for more than two years thereafter, seems to have been in good repute, and entrusted by the plaintiff and others with their business, and there is no doubt that so far as the plaintiff is concerned he acted in the utmost good faith. On or about the 7th day of April, 1884, Cobb, being the apparent owner of said premises, entered into a written agreement for the sale of the same to Sarah J. Pound, who immediately took possession thereof and has retained possession ever since. On or about the 24th of September, 1884, Cobb being still the apparent owner of record of said lot, and being indebted to the defendant Irwin in the sum of \$2,450 conveyed said premises to her with other property by warranty deed. This deed was recorded the next day. This deed, though in form absolute, was intended as a mortgage. Up to this time neither the defendant Irwin or Pound had actual notice of the mortgage to the plaintiff; nor did they have such notice until about the 1st of October, 1884.

On the 4th of October, 1884, Cobb and wife made a quit-claim deed of the lot to the defendant Irwin, and about the same time he made a formal assignment of his interest

in the contract above referred to with Mrs. Pound, and on the 8th of that month Mrs. Pound took a new contract from the defendant Irwin. On the 9th of that month Royce and wife made a quit-claim deed of the lot to the plaintiff. That the defendants Irwin and Pound, as well as the plaintiff, have acted in good faith in this transaction there is not a shadow of doubt. The only question that need be determined is, whether or not the recording of the mortgage to the plaintiff was constructive notice to the defendants Irwin and Pound.

A deed duly acknowledged and recorded is constructive notice to all persons claiming through or under the grantor. *Johnson v. Stagg*, 2 Johns., 510. *Rogers v. Burchard*, 34 Texas, 453. *Doe v. Beardsley*, 2 McLean, 412. *Bates v. Norcross*, 14 Pick., 231. *Schutt v. Large*, 6 Barb., 373. *Flynt v. Arnold*, 2 Met., 619. But where the party executing the deed or mortgage is not in possession and has no record title or apparent interest in the premises, a mortgage executed by him upon such premises is not constructive notice to creditors of or subsequent purchasers from the apparent owner. *Chicago v. Witt*, 75 Ill., 211. *Fenno v. Sayre*, 3 Ala., 458. *Calder v. Chapman*, 52 Penn. St., 359. *Lightner v. Mooney*, 10 Watts, 407. *Losey v. Simpson*, 3 Stockt. Ch., 246. *Cook v. Travis*, 20 N. Y., 402. *St. John v. Conger*, 40 Ill., 535.

The reason is, the record of a conveyance or mortgage is constructive notice to those alone who must trace their title through the grantor or mortgagor by whom the deed or mortgage was made. 2 Pomeroy's Eq., § 761, and cases cited. The plaintiff's mortgage, therefore, was not constructive notice to the defendants.

It is apparent, however, that the plaintiff has rights in the premises which will be protected as far as possible. The defendant Irwin received a deed for a large amount of real estate, as heretofore stated, in September, 1884. This deed, though absolute in form, was in fact merely a mort-

Price v. Lancaster County.

gage. The quit-claim deed delivered a few days afterwards was executed after the defendants had actual notice of the plaintiff's rights. The value of the property thus mortgaged does not appear from the evidence; but if in excess of the defendant Irwin's claims against Cobb, the plaintiff has leave to require her to marshal such securities and exhaust all the property described in the mortgage except the amount due from Mrs. Pound for lot 7, in block 242, in Lincoln, before resorting to the latter fund; and that she receive only so much out of that fund as will satisfy her claim, and assign the remainder to the plaintiff. In all other respects the judgment of the court below is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THOMAS PRICE, PLAINTIFF IN ERROR, V. LANCASTER
COUNTY, DEFENDANT IN ERROR.

18	199
39	884

1. **County not Liable for Taxes Paid by Treasurer to State, School Districts, etc.** Where a county treasurer collects and pays over taxes for the state and for school districts and other municipalities less than and within the county, such county is not liable to the tax payer for such taxes, even if illegally levied, and this would be true whether he sought to recover back such taxes under the provisions of the revenue law or as a general creditor of the county.
2. **Limitation: STATUTE NOT APPLICABLE TO DELINQUENT TAXES.** The statute of limitations prescribing the time within which a civil action may be brought under the code of civil procedure, has no reference to the time within which delinquent taxes may be collected by distress, and is not applicable thereto.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

N. C. Abbott, for plaintiff in error.

Walter J. Lamb, for defendant in error.

REESE, J.

The plaintiff in error filed his petition in the district court, in which he seeks to recover certain taxes paid to the county treasurer for the years 1873 to 1881, inclusive. It is alleged that the county treasurer, on the 12th day of December, 1882, wrongfully levied upon the personal property of plaintiff, and was proceeding to collect the taxes by distraint, when he paid the amount demanded, under protest, for the purpose of preventing a sale of the property. He soon afterwards filed his claim with the county commissioners, asking that the money be refunded. The amount paid was \$412.53. The county board refunded \$25, and disallowed his claim as to the remainder. He then appealed to the district court, where defendant demurred to his petition. The demurrer being sustained, he prosecuted error to this court.

The first count, or cause of action, in the petition—after setting out the taxes levied against him for the various years—alleges, that of the taxes so paid by him the amount for the years 1873, 1874, 1875, and 1877, was \$182.53, and that “there was no assessment of said property by any assessor of said precinct; that there was no certificate or oath of any assessor attached to or returned with any pretended assessment roll of said precinct for any of said years to the county clerk or commissioners of said county, and that the commissioners had no authority or jurisdiction to levy any tax whatever upon any of the property of the plaintiff.” It is also alleged that “all of said property so pretended to have been assessed was, during all the years herein mentioned, situated in Nemaha precinct in said county of Lancaster, and the plaintiff was during said time a resident of said precinct.”

If a cause of action is stated in this count of the petition it must depend upon the clause which seeks to avoid the assessment, for it is not claimed the property was not taxable. It seems to us that the clause referred to is entirely too indefinite. It is alleged there was no assessment by any assessor of the precinct, but in the same sentence it is alleged that there was no oath attached to the assessment roll. If there was no "assessment of the property by any assessor of the precinct" that fact might avoid an assessment; or if there was an assessment, but the oath was not taken by the assessor and returned with the assessment, that fact should be stated.

But, however that may be, the county could not be held for the repayment of the taxes collected for the state or any of the municipalities less than the county. *B. & M. R. R. Co. v. Buffalo Co.*, 14 Neb, 51. If plaintiff seeks to recover by a compliance with section 144 of the revenue law of 1879, he must be limited to the provisions of section 145, Ch. 77, Compiled Statutes, which prohibits the refunding of taxes unless it appears that they were levied for an illegal or unauthorized purpose, or that the property had been twice assessed in the same year, or was not liable to taxation. The petition contains no allegation covering any of these conditions, except as to certain bond taxes, and it is shown that a greater amount was allowed by the board than this tax amounted to, presumably with reference to it. If the provisions of section 144 are limited by the words "hereafter levied" to taxes levied after the act took effect, then plaintiff would derive no benefit from it, as the taxes referred to were all levied prior to the taking effect of the act—September 1st, 1879—so that either with or without these provisions we cannot see that the action could be maintained, as our attention has been called to no prior law permitting the refunding of taxes.

The principal contention of plaintiff is based upon another count or paragraph of his petition, which alleges, in

substance, that more than four years had elapsed after the taxes became due and before the levy was made by the officer, and that during all of said time the plaintiff had personal property in the county, from which the same might have been collected, and that therefore the claim was barred by the statute of limitations.

We are unable to see that this statute applies to the case. No distinction appears to have been made between real and personal property taxes by the law in force at the time these taxes were levied. Taxes were declared to be a perpetual lien upon the real estate upon which they were levied, and no provision is found where the right to collect is affected by the lapse of time. No demand was necessary, and it was the duty of the owner of the property to attend at the treasurer's office and pay his taxes. The statute of limitations is by its terms limited to civil actions under the code of civil procedure, and we cannot see that the right to collect delinquent taxes could be in any manner affected thereby.

But plaintiff insists that he is not seeking to recover under any of the provisions of the revenue law, but upon the ground that "defendant has money in its possession belonging to plaintiff that he has wrongfully and illegally been forced to pay, and that he has a general right of recovery for the amount thereof." We are unable to agree to this proposition. The county was made by law the agent of the state as well as of the lesser municipalities within the county, for the collection of the taxes due them. If we abandon all the provisions of the revenue law for the refunding of taxes, and all statutes giving the commissioners the right to refund it, we leave the commissioners without authority to act, and the appellate court could gain no jurisdiction by the appeal. Furthermore, the taxes other than county taxes could in no sense be said to be a claim against the county.

It follows that the decision of the district court in sus-

taining the demurrer was correct, and the judgment of dismissal must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	203
39	196
18	203
35	905

JOHN CASEBEER AND MARY DRAHOBLE, PLAINTIFFS IN
ERROR, V. CHARLES P. RICE ET AL., DEFENDANTS IN
ERROR.

1. **Malicious Prosecution.** In a case of malicious prosecution the right of action accrues whenever the criminal prosecution is disposed of in such a manner that it can not be revived, and the prosecutor, if he proceeds further, will be put to a new one. *Casebeer v. Drahole*, 13 Neb., 465.
2. **Jury Judge of Fact.** Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it unless the want is so great as to show that the verdict is manifestly wrong. *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb., 529.
3. **Malicious Prosecution: PROBABLE CAUSE: PROOF OF MALICE.** A person in the lawful possession of property, either real or personal, may by force defend against an unlawful invasion of his rights, if such invasion is by force and violence, *providing* such resistance is necessary to the protection of such rights, and *provided* such resistance is within proper bounds, and does not become aggressive. And where in such case the person making the unlawful attack causes the person attacked to be arrested for a crime in making such defense, such arrest will be without probable cause, and if caused with the intent and purpose of wrongfully injuring the person arrested, it will be held sufficient proof of malice.
4. **False Imprisonment: EVIDENCE: MALICE.** In an action of false imprisonment it is incumbent upon the plaintiff to prove by a preponderance of testimony that the criminal prosecution was without probable cause and was malicious. But where the

want of probable cause, is clearly shown, and all the facts and circumstances of the case are before the jury, they may find from the facts showing a want of probable cause, that the prosecution was malicious.

5. ———: PROBABLE CAUSE: MALICE. While ordinarily the question of what constitutes probable cause for a criminal prosecution does not depend necessarily upon whether the offense has, in fact, been committed, nor whether the accused is innocent or guilty, yet where before the commencement of a criminal prosecution the promoters of such prosecution were possessed of full knowledge of all the real facts in the case, and knew that the party charged was not guilty of the alleged offense, proof of the real facts in the case may be made for the purpose of showing a want of probable cause and malice.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

G. M. O'Brien and *J. E. Bush*, for plaintiffs in error, on first point, cited: 2 Addison on Torts, 759. *Bacon v. Town*, 43 Cushing, 217. *Parker v. Farley*, 107 Cushing, 482. *Cardinal v. Smith*, 100 Mass., 159. *Dreggs v. Burton*, 44 Vermont, 124. On fourth instruction, cited: 2 Hilliard on Torts, 469, Chap. 16, § 246b. *Harpham v. Whitney*, 77 Ill., 32. *Ewing v. Sandford*, 19 Ala., 605.

L. M. Pemberton, and *A. H. Babcock*, for defendants in error, on fourth instruction, cited: 1 Hill. on Torts, 191. Cooley on Torts, 167. 2 Add. on Torts, 693. Desty Am. Cr. Law, § 130m. *Scribner v. Beach*, 4 Denio, 448. *Parsons v. Brown*, 15 Barb., 590. *Cerey v. The People*, 45 Id., 262. *Merriam v. Mitchell*, 13 Me., 439. *Shaul v. Brown*, 28 Iowa, 37.

REESE, J.

From the record and pleadings in the cause it appears that on or about the 29th of October, 1880, the defendants in error were arrested upon a criminal charge made against them before the county judge of Gage county. The crime

Casebeer v. Rice.

charged by the complaint was that of an unlawful assembly or, perhaps, what is denominated "rout." The complaint was signed and sworn to by Mathias Drahoble, the husband of one of plaintiffs in error. Such proceedings were had as resulted in a dismissal of the cause and the discharge of the accused by reason of the failure of the prosecution to give security for costs. Defendants in error then brought suit in separate actions, alleging damages sustained by reason of the arrest, etc., and that the prosecution was malicious and without probable cause. Averments are made in the petitions charging both of plaintiffs in error with causing the arrest.

Plaintiffs in error filed separate answers, Mary Drahoble denying generally the allegations of the petitions, and John Casebeer admitting the prosecution, but denying any connection with it. By agreement the causes were tried together. The jury found for defendants in error, and returned verdicts assessing Rice's damages at \$102, and M. Candace Casebeer's at \$200. Defendants in that case prosecute error to this court.

The first contention is, that the dismissal of the criminal prosecution was not such a final determination thereof as would entitle defendants in error to recover. While there are some cases which seem to hold with plaintiffs in error upon that point, yet we deem it well settled by the great weight of authority that there was such a final termination of the prosecution as would enable defendants in error to maintain their action if the prosecution was found to be malicious and without probable cause. In *Casebeer v. Drahoble*, 13 Neb., 465, it was held that the right of action accrues "whenever the particular prosecution be disposed of in such a manner that this (it) cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."

It is next insisted that neither of the plaintiffs in error had anything to do with the criminal prosecution and are

therefore in no way responsible for the same, nor in any sense liable in this action, even if the prosecution was malicious and without probable cause. Upon this branch of the case there was a direct conflict of testimony. The rule is well settled in this court that in such cases the verdict will not be molested unless the preponderance of the testimony is so clearly against it as to satisfy the mind that it is clearly and manifestly wrong. *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb., 537. Applying this rule to the case at bar, we are to inquire whether or not there was sufficient testimony upon this point to sustain the verdict.

Hon. J. E. Cobbey, the county judge before whom the criminal prosecution was conducted, was called as a witness on the part of defendants in error, and after the preliminary proof of signatures, etc., to certain files and records had been made, he is asked to state who filed the complaint with him. His answer was, "Why, Mrs. Drahoble filed it, I think—that is, handed it to me. It was not sworn to before me, but it was handed to me by Mrs. Drahoble, as I remember it." As there is evidently a want of agreement between counsel as to the effect of Judge Cobbey's testimony, we copy that part bearing upon this question, omitting all questions the objections to which were sustained :

Q. Was it handed to you by Mathias Drahoble?

A. It was not handed to me by a man.

Q. State whether it was handed you by a man or woman.

A. It was handed to me by a woman.

Q. You may state what John Casebeer and Mary Drahoble did about this prosecution which has been introduced in evidence.

A. I think it was in the morning; Mrs. Drahoble, or a woman who introduced herself as such, came in considerably agitated and flurried, and handed me a paper, saying she wanted that filed. I looked it over a little, and while I was looking it over and making the proper entries, she told me

they were having a fearful time down there—and some got hurt—and had a fight—a big time, and went on as a woman will sometimes; said she left them to come up and see her attorney, and they decided to put a stop to it, and this was a step in putting a stop to it. She talked some time; I think she was in the office an hour, may be; I did not charge my mind with it, but she told me all about it—everything that had happened, or she thought would happen. That is about all I had to do with her. My impression is she took the warrant down to her attorney; I am not certain; I did not charge my mind with it at the time.

Q. State what, if anything, John Casebeer had to do with it.

A. I don't remember anything about John Casebeer, I think—that is, I don't remember anything in particular; he was around there during the prosecution, but I don't have any particular remembrance of him.

Q. Do you remember him ordering out a subpoena in the case for the plaintiffs?

A. I would not be positive he ordered the subpoena; it might be; the record shows somewhere; I don't remember; I have very little remembrance about it; I have an idea he did it, but I would not be positive about it.

Q. State whether or not John Casebeer was there during the proceedings at any time?

A. John Casebeer was not there that morning, but I think he was there afterwards, twice, that is what I think; he was there twice, perhaps it might have been on the same day, and I think he talked to me once about there, and another time with Colby.

Q. State whether or not he was there on the 3d day November, the time the case was finally disposed of?

A. I cannot say as to that whether he was or not. If this record shows that he was there, he was.

CROSS-EXAMINATION.

Q. Can you describe the kind of a woman that appeared at your office with that paper?

A. I think she was a large woman; rather fleshy. I don't know that I could identify her.

Q. Are you certain it was a woman handed it to you?

A. Oh, yes; there is no doubt about that.

Q. What time of day?

A. I judge about nine o'clock in the morning.

Q. Might you not be mistaken, and might not this have been the day of the trial?

A. No, sir; I am quite certain. That is the only thing in which I might be mistaken, if there was another case on this docket, started in this Casebeer matter, it might be she appeared in that and not in this.

Q. Is there no possibility of being mistaken?

A. There is always a possibility.

Q. You are not certain she appeared?

A. I am quite positive of that. I am pretty positive it was this case.

Q. If she should testify here she was in Blue Springs that day, you would still be positive?

A. If she was in Blue Springs that day, of course I am mistaken, but I think I would want considerable evidence to convince me.

Q. Is it not a fact that the party who signed that complaint never took it out of your office after it was sworn to?

A. I think it was not sworn to before me.

Q. This was 9 o'clock in the morning of the day that entry was made?

A. That is my impression. The entry don't show, but that is my impression. It was in the morning. I would not be very positive about that.

Q. You say in your examination that John Casebeer was there at the time of this examination.

Casebeer v. Rice.

A. Why, I said he was there twice, I think. I think John talked to me about it once.

Q. Was there any other parties about the court room?

A. Oh, yes; there was a number there. There has been so much of that Casebeer business.

The theory of the defendants in error is, that plaintiffs in error caused their arrest so that during the time occupied by defendants in error in going from Blue Springs to Beatrice, in charge of the officer making the arrest, plaintiffs in error could, and did, by force and violence remove defendants in error and certain personal property of Mrs. Casebeer from a house in Blue Springs (the title to the land on which it stood being held in common), and thereby by force and violence, with the aid of the arrest, accomplish what could not be brought about by peaceable methods. One W. E. Parker, a constable at Blue Springs, was called in for the purpose of protecting Mrs. Casebeer during the enforced absence of her husband, and he testified that while he was returning the personal property which had been forcibly removed from the house of defendant in error (Casebeer) he saw plaintiff in error, John Casebeer, there, who stated to the witness that the arrest was made on purpose so he could get a chance to get into that property—get possession of the property, and if he, the witness, didn't keep away, he would do the same thing with him. In addition to the testimony of the two witnesses above referred to, it was shown that soon after the arrest of defendants in error, with five others, and their removal to Beatrice, excepting Mrs. Candace Casebeer, who gave bail in Blue Springs to appear for trial, plaintiffs in error, with a concert of action which appeared to be the result of an understanding, appeared upon the premises in dispute, and by force removed the property there, turning out stock and removing household property, as well as quantities of grain, etc., until restrained by the presence of the officers, who returned the property in part,

and prevented further removals. It is also testified to that at the time to which the criminal prosecution was adjourned plaintiffs in error were present, although by subpoena, counseling with the attorney who conducted the prosecution, and otherwise showing an interest in the result, while defendant in error, Mrs. Casebeer, testified that plaintiffs in error stated to her that the arrest was made to enable defendants in error to get possession of the property.

While to some this testimony might not be satisfactory proof of the connection of plaintiffs in error with the criminal prosecution, yet to the jury it seems to have been satisfactory, and we cannot say there was not enough to sustain the finding. A question of fact was thus presented, which it was the special province of the jury to try. In view of the array of contradictory testimony produced upon the part of the plaintiffs in error, the writer would have perhaps found otherwise, but that is not enough to warrant a court in setting aside a verdict.

It is insisted that if the conclusion that plaintiffs in error were connected with the criminal prosecution can be sustained, it is shown that there was sufficient cause for the arrest, and the verdict must, for that reason, be set aside. We have carefully examined the testimony adduced upon that branch of the case, and are satisfied with the verdict upon that point. Giving the most liberal construction to the testimony of the witnesses for plaintiff in error, the most that could be said is, that there was a conflict and that the jury were justified in finding as they did.

Objection is made to the fourth instruction given to the jury upon the request of defendant in error. It is as follows: "If you find from the evidence that the defendants, or either of them, brought, or caused to be brought, or aided, advised, or assisted in bringing the prosecution against plaintiffs, mentioned and described in plaintiffs' petition, and that the acts and deeds of the plaintiffs which caused said prosecution to be brought were committed by plain-

tiffs in defense of property, of which either or both of them were in lawful possession, either alone or in common with any other person or persons, against the unlawful attempt of defendants to get possession thereof, and that said acts and deeds of plaintiffs were no more forcible and violent than was necessary for the protection of said property against the unlawful attempts of defendants to get possession of said property, then the court instructs you that the defendants had no probable cause for bringing said prosecution; and if you further find that said prosecution was wrongful and injurious to plaintiffs, and known and intended by defendants so to be, you will find a verdict for plaintiffs." The objection to this instruction is, that it misstated the law and left no alternative to the jury but to find a verdict in favor of defendants in error.

As we understand this instruction, and as we think it must have been understood by the jury, it amounts to no more than that if defendants in error were in the lawful possession of property, and that the acts complained of in the criminal prosecution were committed in defense thereof, and that such acts were no more forcible and violent than was necessary for the protection of such property against the unlawful attempts of plaintiffs in error to get possession, then there was no probable cause for the arrest. And if the jury further found that the prosecution was known and intended to be wrongful and injurious by plaintiffs in error, the verdict should be in favor of defendants in error.

We cannot see how this instruction can be said to misstate the law, nor how it could mislead the jury. The right of defense of person and property against the unlawful and violent invasion of either, so long as that defense is within proper bounds and does not become aggressive, has long been recognized, and we think no citation of authorities in its support is necessary. This being true, it must follow that in the proper and legitimate defense of one's possession no crime is committed. If, then, the attacking party

causes and procures the arrest of the other for what the complainant knows is no crime, how can it be said he had probable cause for making the arrest? Then, if in addition to the want of probable cause there is the knowledge and intention that the arrest was and should be both wrongful and injurious, this would amount to malice and the case would be made.

The rights of the parties were properly separated by the fifth instruction, and the jury were fully instructed upon that part of the case.

Plaintiffs in error requested the court to instruct the jury, "That although the plaintiffs may show the want of probable cause by a preponderance of evidence, yet it is not sufficient to support a recovery unless malice be shown also. Malice is not to be presumed but must be shown to exist, as well also as probable cause, so that the plaintiff must prove that the defendants were actuated by a malicious desire to injure him. Therefore, if the jury find from the testimony that the plaintiffs have failed to show by a preponderance of evidence that the defendants commenced the alleged criminal prosecution against him with a malicious intent to injure him you will find for the defendants."

This instruction was refused, and such refusal is assigned for error. It is insisted that the chief error of the trial court in refusing this instruction lay in the fact that the court refused to instruct the jury that malice must be proved, and is not presumed from the fact of there being a want of probable cause. While this might be conceded to be the law as applicable to prosecutions of this kind, yet it is undoubtedly the law that where a want of probable cause is clearly shown all the facts and circumstances of the case are presented to the jury, and if they be of such a character as to imply malice it will be inferred from such facts. The law does not require a plaintiff in an action of this kind to prove by direct testimony the mental condition or

purpose of a person in committing or performing an act, but the character of the act itself with all the surrounding facts and circumstances must be looked to for the purpose of ascertaining, under well-known rules applicable to human conduct, the intent and purpose of the person committing the act. But assuming that the instruction properly states the law we can not say that the court erred in refusing to give it. Plaintiffs in error requested and the court gave, with others, the following instructions bearing upon the question of malice:

"*First.* The general issue being plead in an action of malicious prosecution, the burden of proving these five facts is cast upon the plaintiff, viz.:

"1st. The fact of the prosecution.

"2d. That the defendants were the prosecutors or instigators of it.

"3d. That the prosecution terminated in favor of the plaintiffs.

"4th. That the charge was made without reasonable or probable cause.

"5th. That the defendants in making it were actuated by malice."

"*Second.* That to maintain an action for malicious prosecution the plaintiff must show by a preponderance of evidence malice and want of probable cause. Therefore, if the jury find from the testimony that the plaintiff has failed to prove by a preponderance of evidence that the defendants, maliciously and without probable cause, commenced said alleged criminal prosecution against him, you will find for the defendants."

"*Seventh.* That although the plaintiff may show the want of probable cause by the preponderance of evidence, yet it is not sufficient to support a recovery, unless malice be shown, or may be inferred also, so that the plaintiff must prove that the defendants were actuated by a malicious desire to injure him. Therefore, if the jury find from the

testimony that the plaintiff has failed to show by a preponderance of evidence that the defendants commenced the alleged criminal prosecution against him with a malicious intent to injure him, you will find for the defendants, but proof of the institution of a criminal prosecution without probable cause may be sufficient proof from which malice may be inferred."

As we understand the law applicable to the question of malice, these instructions, when applied to the testimony before the jury, contain a fair statement of it, and in substance give all the essential ingredients contained in the instruction which was refused. But it is not necessary in such cases that express malice be shown. Malice in a prosecution may be inferred from a clear want of probable cause. *Holliday v. Sterling*, 62 Mo., 321. *Newell v. Downs*, 8 Blackf., 523. *Callahan v. Caffarata*, 39 Mo., 136. *Harp- ham v. Whitney*, 77 Ill., 32. *Burt v. Gibbons*, 3 L. J. Exch., 75. *Mowry v. Whipple*, 8 R. I., 360. *Strauss v. Young*, 36 Md., 246. And it may be found by the jury from the same facts which show a want of probable cause. *Harkrader v. Moore*, 44 Cal., 144. *Oliver v. Pate*, 43 Ind., 132. *Ammerman v. Crosby*, 26 Ind., 451.

And if the prosecution was wholly without cause no further evidence of malice is necessary. *Hayes v. Hayman*, 20 La. An., 336. *Holburn v. Neal*, 4 Dana, Ky., 120.

It is next insisted that the court erred in permitting defendants in error to testify as to their guilt or innocence of the offense as charged in the criminal complaint. This objection may be met in brief by observing that we have been unable to find any record of a ruling upon that question by the trial court adverse to plaintiffs in error with the necessary exceptions thereto, and the further suggestion that the whole question was inquired into by both parties. But we are not prepared to say that in a case like the one at bar the investigation was not proper, even if it had been resisted by plaintiffs in error. The proof shows

that plaintiffs in error, at the time of the filing of the complaint had full knowledge of all the real facts constituting the alleged crime. It was competent for defendants in error, upon their theory of the case, to show, if they could, that no crime had been committed by them, and that plaintiffs in error knew that fact. This, if true, and of that the jury were the sole judges, would tend to show a want of probable cause, and that the prosecution was malicious.

We find no prejudicial error in the case, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY, PLAINTIFF IN ERROR, V. WALKER WEBB,
DEFENDANT IN ERROR.

18 215
59 697

Railroads: LIABILITY FOR STOCK KILLED: NEGLIGENCE.

Under the provisions of section one of the act of 1867, Compiled Statutes 1835, Ch. 72, where a railroad corporation neglects to maintain fences and cattle-guards along its road, and horses get thereon, and are injured or killed by the engines or trains running on the road, the railroad company is liable to the owner in damages therefor, and the negligence of the owner in allowing the horses to escape from him will constitute no defense to the action.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error.

T. Appleget & Son, for defendant in error.

REESE, J.

The original action in this cause was instituted for the recovery of damages resulting from injury to a team of horses, caused by a train of cars belonging to plaintiff in error. The allegation of the petition in which the injury to the property is charged is as follows: "That on or about the second day of August, 1882, said defendant was operating a railroad through Johnson county, state of Nebraska, said railroad having been open for use for more than six months in and through said county, and while so operating the same, at the time above stated, and in the day-time, at a place on said road therein where it was required by law to fence its track, but had failed to do so said defendant, by its agents and employes, carelessly and negligently ran an engine and train of cars upon and over one team of horses and one lumber wagon, the same being the property of this plaintiff, and of the value of \$283.00, by reason of which said team of horses was so injured as to be entirely worthless, and it became necessary to kill the same."

The answer admits the injury to the horses, and that the railroad was not fenced, but alleges that the horses were harnessed and hitched to the wagon, equipped and ready for traveling as a team, and that while so hitched the defendant in error left the team standing near the railroad track without anyone to manage and control it, and without being secured or fastened, while he went away from it, and while it was thus left the train came along, at which the team became frightened and dashed across the railroad track in front of the train, and was injured without any fault or negligence on the part of plaintiff in error, and that the carelessness and negligence of defendant in error contributed to the injury complained of. The reply was a denial of the allegations of the answer.

Upon the trial plaintiff in error sought to present to the

jury, as a defense, the question of the contributory negligence of defendant in error, but its prayers for instructions in that direction were refused by the court. This action of the trial court is assigned for error. Two questions are presented for decision. The first contention of plaintiff in error is, that under the issues presented by the pleadings the question of the negligence of both parties was made a prominent one, and that upon the issue so presented the jury was called to pass, and therefore it should have been submitted with proper instructions for their guidance.

By comparing the petition with section one of the act of June 22, 1867, which we will presently notice more fully, it will be observed that the pleader brings himself directly within its provisions. The team was injured by the engine of the railroad company on the track and at a point where the company was required by law to fence its track, but had failed so to do for more than six months. This, with the other allegations of the petition, constituted a cause of action. The fact that plaintiff in error pleaded a statement of facts which did not constitute a defense, and that these facts were denied, did not render it absolutely essential that these immaterial facts or questions (if they were such) should be submitted to the jury.

The whole case must depend upon the second question presented, which is, would the contributory negligence of defendant in error relieve plaintiff in error from its obligation to pay for the injury done to the horses of defendant in error upon its track at a place where it was unfenced, and where, by law, the railroad company was required to fence? The section above referred to is as follows:

"That every railroad corporation whose line of road or any part thereof is open for use shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad

or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, with opens, or gates, or bars, at all the farm crossings of such railroads, for the use of the proprietors of lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings now existing or hereafter established, cattle-guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting onto such railroad, and so long as such fences and cattle guards shall be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same is herein prescribed is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done." Comp. Stat., Ch. 72.

By a fair analysis of this section we think its provisions as applicable to the case at bar are, that the railroad company shall erect and maintain fences on the sides of its track, suitably and amply sufficient to prevent horses from getting on the railroad (except at places other than that where the injury occurred), and in case of its failure so to do it shall be liable for *any* and *all* damages which shall be done by the engines or trains of the company to any

horses thereon. If we are correct in this it is clear that the simple negligence of the owner of the stock injured can be no defense and the ruling of the district court was correct. It may be said that this construction of the act under consideration would render the railroad company liable for injury to stock when the owner had driven them and left them upon the road. But when we consider the purpose of the act, and give it that reasonable construction which such statutes require, no such conclusion necessarily follows. The maxim that "no injustice is done to the consenting person, that is, by a proceeding to which he consents," would then apply. Besides, such an act, if done for the purpose of obstructing the track, would be a violation of the criminal law of the state. It cannot be said that the protection of stock upon a railroad track was the sole object of the law. When we consider that these tracks are incessantly traversed by trains running at a high rate of speed, all of which are carrying persons, and many of which are loaded with passengers, and that it is absolutely necessary to their safety that the track should be kept clear of all obstructions which might endanger their lives, it is apparent that the purpose of the legislature was that, first, perhaps, passengers and employes on the train should be protected; and second, that stock near the line of the road might not be destroyed. It was therefore made the *duty* of the railroad company to fence its road. The language of the statute is, that "*every railroad corporation whose line of road * * * is open for use shall fence the road.*"

As said by Denio, J., in *Corwin v. R. R. Co.*, 13 N. Y., 54: "Having imposed this general and public duty, the legislature has next proceeded to declare some of the consequences of its omission. The corporation in that case is liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon."

The section under consideration is substantially the same as section 42 of the railroad law of New York, enacted in

1848, which has been construed by the courts of that state substantially as herein held. See *B. & M. R. R. Co. v. Brinkman*, 14 Neb., 70, and cases there cited.

The question presented in the case last cited was not identical with the case at bar, and called for a construction of section two of the act of 1867, which applies to "live stock running at large." This section is substantially a copy of the Iowa law, and has been repeatedly construed by the courts of that state. But it must be observed that there is a great difference between the provisions of the two sections, and as section one of our law is not found in the Iowa act we can not look to the decisions in that state for light in its construction.

We are reminded that in construing statutes we are to give force to all their parts, and if section one was intended by the legislature to be as sweeping in its provisions as is here contended for, what could be the use of the second section, and why the provision that a railroad company should be "absolutely liable" for stock injured or killed? To this we reply that, to our mind, the purpose of the second section is, in the main, to afford to the owners of stock running at large a speedy and effectual remedy for the collection of their damages. Stock "running at large" has reference to stock under the control of no person; free commoners, as it is sometimes termed. If stock are *running at large*, not under the dominion of the owner, there can be no defense to an action brought for damages where they have been injured or killed by trains, at a point where the company were required to fence, but had failed to do so. Again, the section provides that certain proceedings may be had for the purpose of ascertaining the value of stock injured or killed, and further, that in case of the failure of the company to pay the value thus found the measure of damages shall be double the value of the property killed or destroyed. To our mind the provisions of section two may all be given force, and no conflict can be found between the two sections. We are aware that the

"double damage" part of section two has been held unconstitutional (*A. & N. R. Co. v. Baly*, 6 Neb., 37), but that fact, even if correct (and upon which we express no opinion), can not militate against the view here expressed as to the purpose of the legislature in enacting the law.

By the first section it is declared that the company must fence its road, that the fences must be amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the track, and in case of default the railroad company shall be liable for any and all damages which shall be done by the engines or trains running on the road. No allusion is made to any conditions with regard to care, or the want thereof, either by the company or the owner of the stock, as affecting the liability of the company, excepting in the last clause of the section where it is provided that if the proper fences, etc., are constructed and maintained the railroad company shall not be liable unless the injury is negligently or willfully done.

We therefore hold that the negligence of defendant in error, if any existed, was no defense to the action, and that the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., concurs.

COBB, CH. J., dissents.

THE STATE OF NEBRASKA, EX REL. ROBERT B. GRAHAM,
v. H. A. BABCOCK, AUDITOR OF PUBLIC ACCOUNTS.

Constitutional Law: APPROPRIATION BY LEGISLATURE. Under the provision of the constitution of the state, that "no money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law," the auditor of public accounts has no authority to draw a warrant upon the treasury for commissions due county treasurers for money collected by them and paid into the treasury, unless a specific appropriation had been made for that purpose.

18	221
50	99
54	657

ORIGINAL application for mandamus.

Mason & Whedon, for relator.

William Leese, Attorney General, for respondent.

REESE, J.

This is an application to this court in the exercise of its original jurisdiction for a writ of mandamus to compel the auditor of public accounts to issue his warrant on the state treasury for a sum of money which the relator claims is due him as commission or fees, for collecting moneys due the state as proceeds from the sale and leasing of school lands. The relator alleges that he collected the moneys referred to and paid them over to the state treasurer without deducting therefrom his commission for making the collection. It is alleged that it is the custom for all county treasurers not to deduct their commissions from the money they collect for the state, but to pay it all to the state treasurer and then to receive from the auditor a warrant for the amount of commissions to which such treasurer may be entitled; that he has demanded from the auditor a warrant for the amount of commissions due him, but that the auditor has refused to issue it.

It is claimed that, under the provisions of section 164, chapter 77 of the Compiled Statutes, he is entitled to this warrant as for money which he has overpaid. This section provides that: "If any county treasurer shall have paid, or may hereafter pay, into the state treasury, any greater sum or sums of money than are legally and justly due from such collector, after deducting abatements and commissions, the auditor shall issue his warrant for the amount so overpaid, which shall be paid out of the fund or funds so overpaid on said warrant."

This section would seem to give the auditor the authority

contended for by the relator, but we must hold that it does not give this authority.

Section twenty-two of article three, entitled legislation, of the Constitution of this state, provides, among other things, that "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the auditor thereon." * * This section must be treated as and is a complete denial of the right or power of the auditor to draw his warrant on the treasury for any sum of money for any purpose except in pursuance of an appropriation made by law. The money is conceded to be in the treasury. It must remain there until drawn out "in pursuance of a specific appropriation" giving authority therefor.

In so far as the section of the revenue law above quoted is in conflict with the provision of the constitution, if at all, it is void. But as the two sections must be construed together, and if possible harmonized, it may be said that there is nothing in the section requiring the warrant to issue without an appropriation being first made, and that there is no conflict. However that may be, it is clear the auditor cannot legally draw the required warrant.

The other questions discussed by counsel need not be noticed, as in our view the writ cannot issue, and is therefore denied.

WRIT DENIED.

THE other judges concur.

18	224
18	463
18	224
49	769

R. LORTON ET AL., PLAINTIFFS IN ERROR, v. JAMES M.
FOWLER, DEFENDANT IN ERROR.

Chattel Mortgage: REPLEVIN BY MORTGAGEE. In an action of replevin by a mortgagee of chattels against the sheriff for taking such chattels on an attachment at the suit of a creditor, and it clearly appearing from the evidence that the sale or assignment of the goods as evidenced by the mortgage under which the plaintiff claims was made in good faith, and without any intent to defraud such creditor, or any creditor of the mortgagor, and that such mortgage was duly recorded, the plaintiff is entitled to recover, although there was not that immediate delivery followed by an actual and continued change of possession of such chattels as is contemplated by Sec. 11 of Chap. 32, of Comp. Stats.

ERROR to the district court for Nemaha county. Tried below before BROADY, J.

John C. Watson, for plaintiffs in error, cited: *Liningier v. Raymond*, 12 Neb., 25. *Nelson v. Garey*, 15 Id., 531. *Bierbower v. Polk*, 17 Id., 268.

Groff & Montgomery, for defendant in error, cited: *Brunswick v. McClay*, 7 Neb., 137. *Gregory v. Whedon*, 8 Neb., 377. *Tallon v. Ellison*, 3 Id., 63. *Hedman v. Anderson*, 6 Id., 392. *Tootle v. Dunn*, 6 Neb., 99. *Temple v. Smith*, 13 Neb., 513. *Dorrington v. Minnick*, 15 Neb., 403-404. *Wake v. Griffin*, 9 Neb., 47. *Twyne's Case*, 2 Coke, 80.

COBB, CH. J.

The firm of Brown & Prouty, general merchants, of Brock, Nemaha county, were indebted to Lorton & Co., wholesale merchants, of Nebraska City, in the sum of thirteen hundred dollars, which was evidenced by a promissory note for that sum, bearing date Nov. 25th, 1884, due one day after date, and drawing interest at 10 per cent per

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annum; and on the 28th day of November, 1884, for the purpose of securing this indebtedness, they executed and delivered to said Lorton & Co. a chattel mortgage upon their entire stock of goods and merchandise, and the furniture and fixtures of their store. The mortgage was in the ordinary and usual form, except that in the clause authorizing the mortgagees upon default to take possession of the goods, they were, by interlineation, authorized to sell the same at private sale as well as at public auction. The mortgage was recorded on the 29th day of November, the day after its execution.

On the 12th day of December, 1884, W. V. Morse and Owen J. Lewis, to whom the said Brown & Prouty were also indebted in the sum of four hundred and eight dollars, sued a writ of attachment out of the county court of Nemaha county, and placed the same in the hands of J. M. Fowler, sheriff of said county, who by virtue thereof attached and seized the said goods.

On the 16th day of December, 1884, the said Lorton & Co. commenced this action for such taking, and replevied the said goods. The cause was tried to the court (a jury being waived by both parties), who found in favor of the defendant, and for a return of said property in case a return thereof could be had; if not, that the defendant recover of the plaintiffs the amount of his special property, the same found by the said court at the sum of four hundred and thirty-three dollars and ten cents, with costs, etc. The plaintiffs bring the cause to this court on error.

The statute, Sec. 11 of Chap. 32, Comp. Stats., provides as follows: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned shall be presumed to

Lorton v. Fowler.

be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the person claiming under such sale or assignment that the same was made in good faith and without any intent to defraud such creditors or purchasers."

In the trial of the case at bar the effort of the defendant seems to have been to establish the proposition that there had been no such immediate, actual, and continued change of the possession of the goods as is contemplated by this section, and in this the learned district court must have been of the opinion that he succeeded. If the case turned solely upon that point, while we would probably differ with that court as to the weight of evidence, I do not think we could say there was such an entire want of evidence to sustain the finding as would justify us in its reversal. But the evidence on the part of the plaintiffs was amply sufficient to prove that the mortgage of the goods was made in good faith and without any intent to defraud the other creditors of the mortgagors, and there was no conflicting evidence whatever as to this point. No objection is made to the form of the chattel mortgage, nor to its filing for record. I am, therefore, of the opinion that the finding and judgment of the district court is without evidence to sustain it. It is, therefore, reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

JABEZ C. CROOKER, PLAINTIFF IN ERROR, v. SAMUEL
M. MELICK, DEFENDANT IN ERROR.

18	227
19	156
18	227
33	789

1. **Amercement of Officers.** Section 513 of the Civil Code gives a more expeditious remedy against sheriffs and other officers in certain cases, but gives no additional right, unless it be the penalty therein provided, and as to that, *quære*.
2. ———: **DAMAGES.** In all actions against sheriffs or other officers for failure to return writs of execution, etc., the inquiry is permitted whether the debt could have been collected, and whether its collection has been prejudiced by the acts of the defendant.
3. ———: ———. The actual loss sustained by the plaintiff in the value or availability of his security by reason of the act or negligence of the defendant is the measure of his damages.
4. ———: ———: **EVIDENCE.** All legal facts necessary and proper to prove or disprove such damages may be pleaded and proved.

ERROR to the district court for Lancaster county. Heard below before MITCHELL, J.

John S. Gregory, for plaintiff in error.

Caldwell & Christy, for defendant in error.

COBB, CH. J.

The plaintiff in error made and presented in the district court of Lancaster county his motion in writing against the defendant in error, in the following words:

"Now comes the plaintiff in said cause, and moves the court for an order of amercement against Samuel Melick, sheriff of Lancaster county, in two causes of action, wherein Jabez C. Crooker is plaintiff, and Edward Haley is defendant, for the reason that executions in said sheriff's hands were not returned by him within the time and manner provided by law, and the sheriff neglected and refused to levy the same upon property of the said Haley, when requested so to do by said plaintiff.

"The amount of amercement demanded is the sum of \$297.00, being the amount and interest due upon said judgments and executions.

"(Signed)

J. C. CROOKER."

To which the defendant in error made and filed the following answer:

"In regard to the motion of Jabez C. Crooker to amerce Samuel Melick, sheriff of Lancaster county, Nebraska, in two causes of action wherein Jabez C. Crooker is plaintiff, and Edward Haley is defendant.

"1. The said Samuel Melick, sheriff of Lancaster county, did within the sixty days make diligent search and inquiry, and found no property of the judgment debtor upon which to make a levy, and informed the said J. C. Crooker, and also notified him within the sixty days, that if he could point out property belonging to the said defendant that he would make a levy upon the same.

"2. That the judgment debtor was possessed of no property subject to execution in Lancaster county.

"3. The money could at no time have been made upon said execution between the issue and the return of said execution.

"4. That the judgment debtor was wholly insolvent, and was possessed of no property subject to execution between September the 24th, and December the 16th, 1884.

"(Signed)

SAMUEL MELICK."

With affidavit of verification.

The following is the journal entry showing the final order of the court in said matter:

"This cause having been submitted to the court at a former day of this term, to-wit, June 29th, A.D. 1885, without argument, upon the motion of the plaintiff for an order of amercement against Samuel Melick, sheriff of Lancaster county, in two causes wherein Jabez C. Crooker

is plaintiff, and Edward Haley is defendant, for the reason that executions in said sheriff's hands were not returned by him within the time and manner provided by law, and the sheriff neglected and refused to levy the same upon property of the said defendant when requested so to do by said plaintiff, and now upon due consideration of said motion, and the answer to said motion filed herein by said sheriff, the court overrules said motion, to which plaintiff duly excepts, and forty days from the rising of court is hereby given plaintiff to reduce his exceptions to writing."

The record also contains copies of the executions in the two causes, with the sheriff's returns thereon. There is no bill of exceptions, and as neither the petition in error nor the brief of counsel point out the error of the district court with greater particularity than that the court erred in overruling the motion for amercement, I conclude that the case was disposed of as though the answer of the sheriff was demurred to by general demurrer on the part of the plaintiff, and it will be disposed of here upon that theory.

Our statute, sec. 513, Civil Code, provides as follows:

"If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come into his hands; or shall neglect or refuse to sell any goods and chattels, lands, and tenements; or shall neglect to call an inquest and return a copy thereof forthwith to the clerk's office; or shall neglect to return any writ of execution to the proper court, on or before the return day thereof * * * such sheriff or other officer shall, on motion in court and two days' notice thereof in writing, be amerced in the amount of said debt, damages, and costs, with ten per centum thereon, to and for the use of said plaintiff or defendant as the case may be."

The only new liability sought to be created by the above statute is the penalty of ten per cent. Without the statute the sheriff would be equally liable for all but the pen-

alty. With it he is only liable for actual damages, possibly with the penalty added. The statute gives a short, cheap, and expeditious remedy, but it only lies where an action in the nature of trespass on the case would lie.

In the case at bar, if it be true, as stated by the sheriff in his answer, that Edward Haley, the execution defendant, had no property within the county at any time during the life of said writs of execution out of which the same or any part thereof could have been collected, how can it be said that the plaintiff was damaged by the failure of the sheriff to return the writs in time?

If the writs had no value when they came into the sheriff's hands, they could lose none by reason of their retention by him until after the return day. And they could gain none, except on the principle of forfeiture. Our laws do not favor forfeitures, and under the provisions of the constitution it is doubtful if the plaintiff can recover a technical *forfeiture* from the sheriff in such a case.

It is the boast of our improved system of pleading and practice that the actual facts of every case may be pleaded and proved without regard to fictions or technicalities. This would be of little avail if in cases like the one at bar the law had closed the door of investigation and ascribed to excusable neglect or unavoidable accident the same consequences of punishment and loss as those which follow criminal malpractice. But such is not the law. It is the actual damage which the plaintiff has sustained in the value or availability of his security that he is entitled to recover in such cases in either form of proceeding, and all legal facts touching such value and availability may always be plead and proved.

"Notwithstanding the proof of the debt and the sheriff's neglect, the inquiry is permitted whether the debt could have been collected. The original debt is, of course, the gist of

Darst v. Backus.

the action, and it is perfectly well settled that the existence of such debt must be proved by the plaintiff. But if that fact is established, the equally important inquiry remains, whether the recovery of the debt has been prejudiced by the acts of the defendant. In other words, whether under any circumstances it could have been collected of the defendant's property." 2 Sedgwick on the Measure of Damages, 7 Ed., p. 447.

The order of the district court is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

E. J. DARST, APPELLEE, v. GUSTAVUS BACKUS, APPELLANT.

Usury: BURDEN OF PROOF. Where usury in the original transaction for which negotiable promissory notes were given is proved, a party who claims to have purchased the notes before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value before maturity and without notice.

APPEAL from Burt county. Tried below before NEVILLE, J.

H. H. Bowes, for appellant.

R. B. Daley, and Hopewell & Dickinson, for appellee.

MAXWELL, J.

This action is brought upon two promissory notes, as follows:

"\$974. TEKAMAH, Neb., June 17th, 1883.

"Ninety days after date I promise to pay to C. W. Conklin or order, nine hundred seventy-four dollars, for

18	231
24	633
18	231
25	380
18	231
27	275
18	231
34	515
18	231
39	667
18	231
41	42

Darst v. Backus.

value received, payable at the office of C. W. Conklin, Tekamah, Nebraska, with interest at the rate of ten per cent per annum. If this note is not paid at maturity, to draw ten per cent from date.

“JOHN S. LEMMON,

“JOHN TALLIN.

“L. PHELIN.

“Witness to mark :

“A. T. LARSON.

“GUSTAVUS ^{his}X BACKUS,
mark.

“JOHAN LARSON.”

“\$315 48.

“TEKAMAH, January 23d, 1883.

Ninety days after date I promise to pay to C. W. Conklin, or order, three hundred fifteen and $\frac{48}{100}$ dollars for value received, payable at the office of C. W. Conklin, Tekamah, Nebraska, with interest at the rate of — per cent per annum. If this note is not paid at maturity, to draw ten per cent interest from date.

“JOHN S. LEMMON,

“JOHN THALIN,

“L. THELIN,

“Witness to mark :

“A. T. LARSON.

“GUSTAVUS ^{his}X BACKUS,
mark.

“JOHAN LARSON.”

Darst claims as assignee before maturity of the notes. The defendant Backus filed an answer to the petition, wherein he alleges in substance that the notes in question were not transferred until after they became due; that he is merely a surety on said notes, John S. Lemmon being the principal; “that the notes sued on were given to renew and extend notes given by said Lemmon to said Conklin on December 2d, 1882, one for \$974, and another for \$168.48, the interest on said \$974 at the rate of 24 per centum for six months. That to said sum of \$168.48 was added 24 per centum per hundred on said sums of \$974 and \$168.48, and for which, together with said sum

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of \$168.48 of said note of \$315.48 mentioned in the 2d paragraph of said plaintiff's petition was given," etc. The reply is a general denial. On the trial of the cause, judgment was rendered in favor of the plaintiff for the sum of \$1,453.63. The defendant Backus appeals.

The testimony fully sustains the plea of usury. The principle is now well settled that mere illegality in the consideration of a note which is not declared void by statute will not affect the rights of a *bona fide* purchaser for value. *Wortendike v. Meehan*, 9 Neb., 228. *Norris v. Langley*, 19 New Hamp., 423. *State Bank v. Thompson*, 42 Id., 369. *Converse v. Foster*, 32 Vt., 828. *Sistermans v. Field*, 9 Gray, 331. *Smith v. Columbus State Bank*, 9 Neb., 31. *Paton v. Coit*, 5 Mich., 505. Where, however, the illegal consideration is shown, the burden of proof is on the plaintiff to show that he is a *bona fide* holder for value before the maturity of the note, and without notice. *Savings Bank v. Scott*, 10 Neb., 86. *Olmstead v. N. E. Mtge. Sec. Co.*, 11 Id., 492. *Cheney v. Cooper*, 14 Id., 416. *Evans v. De Roe*, 15 Id., 631. In this case there is not a particle of proof that the plaintiff either purchased the notes before maturity, paid any sum whatever for them, or that he was ignorant of usury in the transaction, which the undisputed testimony clearly shows to have existed. This being the case, the notes are subject to the defense of usury. The judgment of the district court must therefore be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

LUTHER R. WRIGHT ET AL., PLAINTIFFS IN ERROR, V.
CHARLES H. B. ROUSS, DEFENDANT IN ERROR.

Justice of Peace: LIABILITY FOR WRONGFUL ISSUE OF ATTACHMENT. Where an action by attachment is brought before a justice of the peace against a non-resident of the state, and his property attached and sold, the justice will be liable if the cause of action is not founded on contract, judgment, or decree.

ERROR to the district court for Douglas county. Heard below before NEVILLE, J.

W. J. Connell and *Simeon Bloom*, for plaintiffs in error, cited: *Clark v. Spicer*, 6 Kan., 440.

Warren Switzler, for defendant in error, cited: *Drake Attachments*, §§ 14, 15, 17, 19, 22, 34, 35, 36. *Jeffrey v. Wooley*, 5 Halst., 123. *Handy v. Brong*, 4 Neb., 60. *Elliott v. Jackson*, 3 Wis., 649. *Strock v. Little*, 45 Penn. State, 416.

MAXWELL, J.

This case was before this court in 1883, and is reported in 14 Nebraska, 457, the judgment of the court below being reversed. On the second trial the jury returned a verdict in favor of Rouss for the sum of \$131.08, upon which judgment was rendered. On the former hearing it was held that the affidavit for an attachment and bill of particulars filed with the defendant Wright as the foundation of the action did not show that the case was for a debt or demand arising upon contract, judgment, or decree, and did not authorize the issuing of an attachment against a non-resident. On the second trial the defendant Wright introduced testimony showing the nature of the transaction, claiming that the action was to recover damages for a breach of contract—delay in delivering goods.

The testimony shows the following facts: The defendant in error, Rouss, at the time this transaction took place, in 1879, was a merchant in New York City. In August of that year one Jacob Levi, who resided in Troy, New York, purchased of Rouss goods of the value of about \$124.70, to be shipped C. O. D. to one Isaac Levi, a brother of Jacob, at some point in Nebraska. It is claimed on behalf of the plaintiff in error that the goods were to be shipped to Omaha, and that Rouss shipped them to Homer, Dakota county, and that they did not reach Omaha until December, 1879. Jacob Levi, when he purchased the goods, paid thereon the sum of \$12.50, "as security that the goods would be taken out on arrival." The goods were directed to C. H. B. Rouss, Homer, Nebraska. A draft for the amount of the bill, with the bill of lading attached, was by direction of Jacob Levi sent to a bank at Omaha, but as Isaac Levi could not be found, they were sent to a bank at Troy, New York, and presented to Jacob Levi, who refused to pay the draft, upon the ground that the debt was that of his brother. Neither of the Levis paid for the goods nor offered to do so. At the time Jacob Levi purchased the goods in question he delivered to Rouss other goods of the value of about \$30.00, which Rouss agreed to ship with the goods in question. When Isaac Levi was informed that the goods were at the depot in Omaha he did not offer to pay for them or in any manner comply with the contract on his part, but at once instituted proceedings against Rouss before Wright, justice of the peace, and attached the goods in question, which were sold under the attachment. This action was brought against Wright to recover the value of the goods, upon the ground that the justice had no jurisdiction.

The testimony shows that the goods were sent at once to Homer, Nebraska, that being the place where Rouss testifies he was directed to send them. Isaac Levi testifies that he "had no particular one place as a center of business;"

State v. McLelland.

that his "head-quarters during that time" was "wherever I put my hat down." He also testifies, "I received his (Rouss') invoice. They came to Plattsmouth first, and then got a letter." This seems to have been soon after the goods were shipped. Whether the invoice and letter contained a statement as to place of shipment does not appear, but as no complaint is made on that ground it is probable that such was the case. Rouss appears to have acted in good faith in the entire transaction. The goods appear to have been shipped immediately after they were purchased. The proof shows that Levi, without the slightest attempt on his part to comply with the contract, caused the attachment to be issued and levied upon the goods in question. The proof fails to show a cause of action arising upon contract, and does not aid the affidavit and bill of particulars in the case of *Levi v. Rouss*. The case, therefore, comes within the rule established by this court on the former hearing, viz., that where an attachment is issued by a justice of the peace against the property of a non-resident, and the cause of action is not founded on contract, judgment, or decree, the justice is without jurisdiction, and is liable. It follows that the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	286
18	421
20	97
21	654
24	591
18	236
37	16

STATE, EX REL. MARTIN J. HUFF, v. J. W. McLELLAND,
COUNTY CLERK, NANCE COUNTY.

18	236
56	673
56	674
56	676
18	236
459	110
59	568
18	286
60	386

1. **Constitutional Law:** ENROLLED BILL PRIMA FACIE EVIDENCE OF THE PASSAGE OF LAW. The certificate of the presiding officer of a branch of the legislature that a bill has duly passed the house over which he presides is merely *prima facie* evidence of that fact, and evidence may be received to ascertain whether or not the bill actually passed.

2. ——— : EVIDENCE. The journals of the respective houses are records of the proceedings therein, and if it should appear from them that a bill had not actually passed, the presumption in favor of the certificate would be overthrown and the act declared invalid.

ORIGINAL application for mandamus.

W. F. Critchfield, for relator.

George D. Meikeljohn, for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the defendant, who is county clerk of Nance county, to give notice of an election for register of deeds of said county at the election to be held therein November 3d, 1885. At the last session of the legislature an act was passed by both branches of the legislature creating the office of register of deeds in counties having not less than fifteen thousand inhabitants. The bill was then enrolled, and the enrolled bill, properly certified by the presiding officers and chief clerks of each house, was duly presented to the governor, and by him approved. In the bill that passed the legislature the number of inhabitants in a county entitled to a register of deeds is expressed in figures "15,000." In the bill as enrolled the number given is "1,500." Laws 1885, Ch. 41. Comp. Stat., Ch. 18, secs. 77a-d. It will thus be seen that the bill providing for a register of deeds in counties having 15,000 or more inhabitants was never presented to or approved by the governor, while the bill actually approved was not passed by either house. The question for determination is, Is the enrolled bill, as certified by the presiding officers of both branches of the legislature and approved by the governor, the exclusive evidence of what the law is? Or can the court inquire whether the alleged act was in fact passed and is a valid law? The

question is presented to this court for the first time, and requires an examination of the authorities relating to the subject.

In *Pacific Railroad v. The Governor*, 23 Mo., 353, decided in 1856, a bill to issue the bonds of the state to the amount of \$800,000 to aid in the completion of the railroads of the state was passed by the legislature of Missouri and vetoed by the governor. It was alleged that the bill passed over the governor's objection by the requisite majority and had become a law. The court held, Leonard, J., dissenting, that the validity of an enrolled statute, authenticated in the manner pointed out by law by the certificate of the presiding officers of the two houses of assembly that it passed over the governor's veto by the constitutional majority, cannot be impeached by the journals showing a departure from the forms prescribed by the constitution in the reconsideration of the bill. It is said (page 364), "By the common law the statute roll was absolute and conclusive proof of a statute. The record could not be contradicted. It implied absolute verity."

In *Clare v. The State of Iowa*, 5 Iowa, 509, it was held that the original act on file in the office of the secretary of state is the ultimate proof of a statute. The question in that case was between the original statute and an erroneous copy thereof.

In *Duncombe v. Prindle*, 12 Iowa, 2, the object of the action seems to have been to obtain a construction of certain statutes for the purpose of determining whether townships 90-91, ranges 27-30, were within the territorial area of Webster or of Humboldt county, and it was held that the enrolled bill, signed by the presiding officers of the senate and house of representatives and approved by the governor, was the ultimate and conclusive proof of the legislative will, and *Clare v. The State*, 5 Clarke, 509, was cited with approval.

In *Green v. Weller*, 32 Miss., 651, an amendment to the

constitution abolishing the superior court of chancery and transferring full equity powers to the judges of the circuit courts, was passed by the legislature, submitted to the people of the state, and the amendment adopted, and it was held that an enrolled bill, when duly authenticated and signed by the governor, was conclusive evidence of its enactment, and that it cannot be impeached.

In *Evans v. Browne*, 30 Ind., 514, the question arose as to the passage of an act by the requisite majority, and it was held that an enrolled bill, properly authenticated by the proper officers of the respective branches of the legislature and approved by the governor, was conclusive evidence of its existence as a law.

In *Fouke v. Fleming*, 13 Md., 392, the question involved was the validity of certain statutes affecting bills of sale and mortgages of personal property, and it was held in effect that the engrossed bill signed by the governor was better evidence of what the law was than the journals of the two branches.

In *People v. Devlin*, 33 N. Y., 269, an action was brought by the attorney general under a statute to recover from the defendant certain fees and commissions held by him as chamberlain of the city and county of New York. The defense was, that after the passage of the act and before its approval by the governor he, at the request of the assembly, returned the bill to it. Sec. 5 of the act was then stricken out, the bill sent to the senate, which denied the authority of the assembly to change the bill. The court held that the assembly had no power to recall the bill, nor the governor any power to return it. That "when both houses have thus finally passed a bill and sent it to the governor, they have exhausted their powers upon it, except the power of sending it to the governor by the house in which it originated, according to parliamentary law." There are expressions in the opinion that the journals could not be resorted to for the purpose of ascertain-

ing whether an act had been passed by the requisite majority or not; but the question does not seem to have arisen in the case.

In *Pangborn v. Young*, 32 N. J. Law, 29, the question involved was the validity of "An act to establish a police district in the county of Hudson, and to provide for the government thereof." The case cited, in some of its features, resembles the one at bar, yet the court held that it was not competent for the court to go behind the attestation of the presiding officer of each house and the approval of the governor, and admit evidence that the bill actually passed by the legislature was different from the one submitted to and approved by the governor. These decisions are based principally on the common law, and questions relating to constitutional restrictions are not discussed, or but briefly referred to. While at common law the journals of either house are proper evidence of the action of that branch of the legislature upon all matters before it (*Jones v. Randall*, Comp., 17; *Root v. King*, 7 Cowen, 613), yet no case has been cited where it has been held that under the common law power the court would resort to the journals for the purpose of establishing the *invalidity* of an act properly certified by the presiding officers of each house and approved by the executive.

It must be borne in mind that the parliament of England before its separation into two bodies was a high court of judicature, possessed of the general power belonging to such court; and after the separation the power remained with each body, because each was considered to be a court of judicature and exercised the functions of such court. Cooley Const. Lim., 5th Ed., 161. Hence the power of either house of parliament to punish for contempt. *Id.* *Kelbourne v. Thompson*, 103 U. S., 168. Being a court the record of each house imported absolute verity. In this country, however, legislative bodies do not possess judicial powers. The records, therefore, are not those of a

court; but are, nevertheless, primary evidence to show the action of each house upon any matter before it. The constitution of this and a number of other states require each house to keep a journal of its proceedings, and publish the same, and provides that "no bill shall be passed unless by the assent of a majority of all the members elected to each house of the legislature. And the question upon final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered on the journal." It is also provided that "every bill and concurrent resolution shall be read at large on three different days in each house," etc.

It is well known that the object of these provisions was to prevent crude and hasty legislation. The journals must show that a majority of all the members elected to each house voted in favor of the passage of a bill before it can become a law. In this state at least, from its earliest legislature, the rules have required the reading in each house of the proceedings of the preceding day in order that the journals might be corrected. The certificate of the presiding officer of each house that a bill has been duly passed by the house over which he presided, therefore, is merely *prima facie* evidence of that fact, and the court may go behind such certificate and inquire into the facts of the case. And this is the view of the supreme court of the United States in *Gardener v. Collector*, 6 Wall., 499, where it is said (page 511): "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

In *Legg v. Mayor*, 42 Md., 220-225, the case of *Gardiner v. Collector* is cited with approval. It is said: "While the presumption arising from the proper forms of authentication of a statute is very strong, that the statute was regularly and constitutionally enacted by the legislature, the authorities maintain that such presumption may be overcome by competent evidence, and the statute may be shown to have never been constitutionally enacted. And this court has so decided at the present term in the case of *Berry v. Drum Point Railroad*, 41 Md., 446. A valid statute can only be passed in the manner prescribed by the constitution, and where the provisions of that instrument in regard to the manner of enacting laws are wholly disregarded in respect to a particular act it would seem to be a necessary conclusion that the act, though having the forms of authenticity, must be declared to be a nullity. otherwise the express mandatory provisions of the constitution would be of no avail or force whatever."

In *Spangler v. Jacoby*, 14 Ill., 297, it was held that the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and that the signature of the speakers and governor to an act are presumptive that it became a law in pursuance of the constitution; but that this presumption may be overcome by the journals. To the same effect are *People v. Mahaney*, 13 Mich., 482. *Moody v. State*, 48 Ala., 115. *People v. De Wolf*, 62 Ill., 253. *State v. City of Hastings*, 24 Minn., 78. *Southwick Bank v. Com.*, 26 Penn. St., 446. *Jones v. Hutchinson*, 43 Ala., 721. *Fowler v. Pierce*, 2 Cal., 165. *People v. Supervisors*, 8 N. Y., 318. *Speer v. Plank Road Co.*, 22 Penn. St., 376. Opinion of the Justices, 35 N. H., 579-584. Opinion of the Justices, 45 Id., 607-614. Opinion of the Justices, 52 N. H., 622-625. *People v. Pardy*, 2 Hill, 31. *Prescott v. Board of Trustees*, 19 Ill., 324. *People v. Starne*, 35 Ill., 121. *Coleman v. Dobbins*, 8 Ind., 156-157.

In the last case cited, it is said (page 162): "It is said, *arguendo*, in *Purdy v. The People*, 4 Hill, 384, that *nul tiel* record cannot be pleaded to a statute; and in support of this position several English authorities are cited. This undoubtedly is the English doctrine, growing out of their peculiar institutions. Their law-making power is omnipotent. Not only the common statute law governing the ordinary relations of life, but the British constitution itself, is the creature of parliament. In this country legislative bodies are created by the constitution. Thus every act may be tested by that instrument and declared void if not in conformity to its requirements."

The journals of each house were evidently intended to furnish the public and the courts with the means of ascertaining what was actually done in each branch of the legislature. They are to be treated as authentic records of the proceedings, and the court may resort to them when the validity of an act is questioned upon the ground of the failure of the legislature to observe a matter of substance in its passage, for the purpose of ascertaining whether the constitutional provisions have been substantially complied with or not. The certificate of the presiding officers is merely *prima facie* evidence that an act has been duly passed, and will be overthrown if it appears from the journals that it was not. The necessity for such a provision is apparent, as this is the second act passed at the last session of the legislature which has been before this court where the provisions of the original act were changed and others inserted, apparently without the knowledge of the members. These acts were properly certified when presented to the governor for his approval, but this one at least did not pass. It follows that the act is of no force and effect, and the writ must be denied.

WRIT DENIED.

THE other judges concur.

CITY OF LINCOLN, PLAINTIFF IN ERROR, v. SAMUEL B.
WALKER, DEFENDANT IN ERROR.

1. **Negligence: CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF.** In an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant.
2. ———: **EXCAVATION IN STREETS OF CITY.** A person traveling in a public street, if he exercise ordinary care, has a right to be absolutely safe against all accidents arising from obstructions or imperfections in the street. And if a person is authorized to make an excavation in the street, he is bound at his peril to protect the same and leave the street in as safe condition as it would be if the excavation had not been made.

ERROR to the district court for Lancaster county. Tried below before GASLIN, J., sitting for POUND, J.

A. C. Ricketts (*Mason & Whedon* with him), for plaintiff in error, cited: *Reynolds v. N. Y. C. & H. R. R.*, 58 N. Y., 248. *Weber v. Id.*, 58 Id., 451. *Masseth v. R. R.*, 64 Id., 524. *Thompson on Negligence*, 1236. *Rudolph v. French*, 44 How. Pr., 160. *Wendell v. R. R.*, 91 N. Y., 420. *Aurora & C. R. R. Co. v. Grimes*, 13 Ill., 585. *Dyer v. Talcott*, 16 Ill., 300. *Galena, &c., R. R. Co. v. Fay*, 16 Ill., 558. *Brannan v. May*, 17 Ga., 136. *Edwards v. Carr*, 13 Gray (Mass.), 234. *Perkins v. Eastern &c., R. R. Co.*, 29 Me., 307. *Walker v. Herron*, 22 Tex., 55. *Hyde v. Jamaica*, 27 Vt., 443. *Dressler v. Davis*, 7 Wis., 527. *Chamberlain v. M. & M. R. R. Co.*, 7 Wis., 426. *M. & C. R. R. Co. v. Hunter*, 11 Wis., 160.

Lamb, Billingsley & Lambertson, for defendant in error, cited: *Randall v. N. W. Tel. Co.*, 54 Wis., 147. *Omaha R. R. v. Doolittle*, 7 Neb., 125. *Mayor v. Dodd*, 58 Ga., 238.

MAXWELL, J.

This action was brought by the defendant in error against the city of Lincoln to recover damages alleged to have been sustained by him from falling into an excavation on O street, in front of block 52, whereby he sustained damages to the amount of \$3,000. The answer is, that said plaintiff well knew of said excavation; that it was well protected by guards placed over and across the sidewalks where they approached said excavation; that the street lamp of the St. Charles Hotel lighted up the same, and would have enabled the most casual observer to see the nature and extent of the excavation; that the injury was occasioned wholly by the plaintiff's negligence, etc. The jury returned a verdict in favor of the plaintiff below for the sum of \$1,200. The city filed a motion for a new trial, in which are forty-one assignments of error. The motion was overruled and judgment rendered on the verdict, but taxing the costs to each party.

The errors relied upon are to the giving and refusing certain instructions.

The testimony tends to show that at the time the accident occurred a large brick building was being constructed on the north-east corner of block 52, fronting on 8th and O streets; that an excavation of the same depth as the cellar extended into O street from 12 to 15 feet, and from 50 to 65 feet in length; that this excavation was walled up a little above the surface of the ground, being about four inches above at the north-east corner, and nineteen at the north-west; that as this excavation extended across the sidewalk a temporary fence was erected across the sidewalk on the east and west sides by nailing up two six or eight inch boards at each of said places; that a similar fence was constructed on the north side, the posts consisting of 2x4 scantling 5 feet in length, driven into the ground about 18 inches, and two 6 or 8 inch boards nailed on to

these posts. There were two openings left for carrying material into the building, one being near the north-east corner, and the other near the north-west corner. It is claimed that these openings were closed at night, but this is denied.

The distance this fence was from the excavation is not certain, some of the witnesses saying it was close to the wall of the excavation, while others state that it was three feet away. A temporary sidewalk from three to four feet in width was constructed around this excavation, laid on 2x4 inch scantling, and the fence posts were nailed to the south side of the temporary walk. The St. Charles Hotel was immediately west of the excavation in question, and the fence around it commenced on the east side of the hotel. There was a dim light in front of the hotel, apparently at the outer edge of the sidewalk, showing the name of the hotel. O street is one of the public streets of Lincoln, the Union Pacific depot being located at the foot of the street, and there being a very large number of persons passing and repassing along said street. On the 24th of November, 1881, the plaintiff below, being a stranger in Lincoln, left the Oriental Hotel in said city about 7 o'clock in the evening to go to the Union Pacific depot. On inquiring the way he was directed to go north to O street, thence west along said street to the depot. The night seems to have been very dark, and the plaintiff not knowing of the obstruction in question, while a short distance east of the same, two men passed on to the sidewalk about 40 feet in front of him, going in the same direction that he was, and supposing them to be more familiar with the streets than he was he followed them, being guided by their voices. As the two persons named came in front of the St. Charles Hotel he observed that they passed between the light in front of the hotel and that building, being considerably to his left, and he believing that he was too far into the street, stepped to the left and fell into the ex-

cavation in question, a depth of 7 feet 3 inches, and sustained serious injuries by which he was rendered incapable of performing any labor for a number of months. The verdict is not too large if the city is liable. The attorneys for the city asked the following instruction, which was refused :

"The jury is instructed that before the plaintiff can recover in this action it is incumbent upon him to show that no negligence of his contributed to the injury, damages for which are claimed herein, and that upon the plaintiff rests the burden of proof of the absence of such contributory negligence."

There is no uniform rule established in regard to the party upon whom rests the burden of proof of contributory negligence. In some of the states it is held that where the plaintiff can prove his case without showing contributory negligence, the burden is on the defendant. In others, that the plaintiff's care is not presumed, and he must disprove contributory negligence. In some of the cases it is held that there is no presumption as to care, or the want of it; and that if the facts show a duty of care, the plaintiff must give some evidence that he exercised it, otherwise not. The question is presented to this court for the first time.

In *Randall v. N. W. Tel. Co.*, 54 Wis., 140 (11 N. W. R., 419), it was held that contributory negligence was purely matter of defense, citing *Milwaukee R. R. Co. v. Hunter*, 11 Wis., 160. *Hoyt v. Hudson*, 41 Id., 105. *Prideaux v. Mineral Point*, 43 Id., 524. *Bessex v. R. R. Co.*, 45 Id., 477. And this seems to be the rule of the United States courts. *R. R. Co. v. Gladmon*, 15 Wall., 401. *I. R. R. Co. v. Horst*, 93 U.S., 291. See also *Kelly v. C. & N. W. R'y Co.*, 19 N. W. R., 521.

The New York rule seems to be, that if the evidence shows the plaintiff's presence or conduct, or that of his servant or agent, to have been involved in the disaster or

its causes, then he must disprove contributory negligence. Abbott's Tr. Ev., 596. See the New York cases cited in 18 Albany Law Journal, 144, 164, 184; and this rule is recognized in Massachusetts. *Parker v. Lowell*, 11 Gray, 353.

In Pennsylvania it is held that contributory negligence is matter of defense, and ordinarily the burden of proving it is on the defendant. *Mallory v. Griffey*, 85 Penn. St., 275. *Penn. Canal Co. v. Bentley*, 66 Id., 80. *Penn. R. R. Co. v. McTighe*, 46 Id., 316. *Beatty v. Gilmore*, 16 Id., 463. And in Vermont. *Hill v. New Haven*, 37 Vt., 501. *Lester v. Pittsford*, 7 Id., 158. And the same rule prevails in New Jersey. *Durant v. Palmer*, 4 Dutch., 544. There are many other cases, both in support of and against the rule, to which we need not now refer. In view of the conflict in the authorities we are compelled to adopt such rule as may seem most consonant with justice. This being so, there certainly is no presumption that the plaintiff was negligent; we therefore hold the rule to be that if the plaintiff can prove his case without showing contributory negligence, it is a matter of defense to be proved by the defendant. Abbot Trial Ev., 595, and cases cited.

There is nothing in the testimony on behalf of the plaintiff tending to show that he was guilty of contributory negligence. The burden of proof of that fact, therefore, was on the defendant. The court did not err, therefore, in refusing to give the instruction in question. And no contributory negligence being shown, the plaintiff was entitled to recover for his injuries if the proper precautions were not taken to prevent persons passing along the temporary sidewalk adjoining the excavation from falling into it. As to the liability of the city in such case there is no doubt.

In *Palmer v. Lincoln*, 5 Neb., 136, it was held that where the obstruction results directly from the acts which the contractor is required to do, the person who employs

him is equally liable for the injury. *Robbins v. Chicago*, 4 Wall., 679. *Storrs v. Utica*, 17 N. Y., 108. *Scammon v. Chicago*, 25 Ill., 424. That is, where the contract itself requires the performance of a work intrinsically dangerous, however skillfully performed, the party authorizing the work is regarded as the principal. Dillon on Mun. Cor., § 792. And any person traveling in a public street has a right to be absolutely safe, if he exercise ordinary care, against all accidents arising from obstructions or imperfections in the street. If a person is authorized by the proper authorities to make an excavation in the street, he is bound at his peril to protect the same, and keep it properly guarded. He must have the walk or street in as safe a condition as it would be if the excavation had not been made. The city cannot exempt itself from liability resulting from the unsafe condition of the streets, and has no authority to authorize another to make them unsafe. *Irvine v. Wood*, 4 Robt., 138. *Cosgrove v. Morgan*, 18 N. Y., 84. *Hart v. Mayor*, 9 Wend., 607. *Dygert v. Schenk*, 23 Wend., 446.

In the case last cited the defendant dug a raceway across the highway on his own premises to conduct water, and erected a bridge over the race. The plaintiff's horse fell through by the breaking of a plank, and was injured. The court say (page 447): "All the public could require was that he should make and keep the road as good as it was before he dug the ditch. That he accomplished by building a substantial bridge originally, which did not get out of repairs for a number of years. The road, however, in the end proved to be less safe than it was when the bridge was first built, certainly less so than before the ditch was dug. In suffering this the defendant came short of his obligation to the public," etc. *Robbins v. Chicago*, 2 Black., 418. Wood on Nuisance, 276-277, and cases cited in notes. We have no doubt of the liability of the city in such case. We see no error in the instruc-

City of Lincoln v. Walker.

tions of the court, and it is evident that substantial justice has been done.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SAME v. SAME.

Negligence: EXCAVATION IN STREET. A person who passes along a public street open to travel has a right to presume that it is in a reasonably safe condition, and if in the exercise of reasonable care he falls into an excavation in the street, which was not adequately protected, and sustains injuries, he may recover therefor in a proper case.

REHEARING of foregoing case.

C. E. Magoon and *O. P. Mason*, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error.

MAXWELL, J.

A motion for a rehearing was filed on behalf of the city, upon the filing of the foregoing opinion, accompanied by an elaborate brief, in which the principal questions involved in the case were ably discussed and presented, and a rehearing was granted and the case again argued and submitted. The facts are stated in the former opinion and need not be repeated here. The chief justice, in a lengthy and able dissenting opinion filed herewith, has stated a considerable portion of the evidence and copied the instructions given and refused. It is unnecessary, therefore, to copy the same here.

It will be seen that the instructions of the court were very favorable to the city, and that all the instructions asked were given in other instructions, particularly No. 9 asked by the city and refused.

If, on the facts proved in this case, a plaintiff was unable to recover, the effect would be virtually to exempt municipal corporations from liability where excavations were made in the sidewalks and left without sufficient protection. If such a change in the law is made it should be done by the legislature, and not the courts. The rule as to contributory negligence adopted by this court is conceded in the dissenting opinion to be the correct one, and as the evidence on the part of the plaintiff below not only failed to show contributory negligence on his part, but tended to negative the existence of such negligence the burden of proving the same devolved on the city. The instruction asked, therefore, was properly refused.

It is very clear that justice has been done. The undisputed testimony shows that the plaintiff below, while walking along O street, on his way to the U. P. depot, between 7 and 8 o'clock in the evening, fell into the excavation in question and sustained injuries of a serious character, and which he did not recover from for several months. The clear weight of testimony also shows that the excavation on the whole or a considerable part of the north side of the lot in question was left unguarded—without barriers to prevent persons from falling into the same. A person who by night or day passes along a public street open to travel has a right to presume that it is in a safe condition; and if, in the exercise of reasonable care, he falls into an excavation in the street which was not adequately protected, and sustains injuries, he may in a proper case recover therefor. *Barnham v. Boston*, 10 Allen, 290. *Stinson v. City of Gardiner*, 42 Me., 248. *Williams v. Clinton*, 28 Conn., 264. *Tolland v. Wellington*, 28 Id., 578. We ad-

here to our former opinion, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

REESE, J., concurs.

COBB, CH. J., dissenting.

Being unable to agree with the majority of the court in the opinion at which they have arrived in this case, and in view of the importance of the questions involved, and the growing frequency of actions for injuries of this kind, seriously threatening the value of property within the limits of our municipal corporations, I present my views of the law of the case somewhat more at length than is usual in dissenting opinions.

This cause was heard at the January term, 1884, when the judgment was affirmed. An application for a rehearing on the part of the plaintiff in error having been allowed, the cause was thoroughly reargued at the present term.

The action was for damages sustained by the plaintiff by reason of his falling into an area of a new building in course of construction, which, it is alleged, had been negligently left unguarded.

There was evidence tending to prove that at the time of the injury there was in front of the new building at the corner of O and Eighth streets, on the south side of O and west side of Eighth, opposite the Metropolitan hotel in the city of Lincoln, an excavation (area) extending along the O street front of the building, about 65 feet in length, 18 or 20 feet in breadth, and from 8 to 9 feet in depth. There was an area wall around this excavation, extending from the bottom to the top of the ground, and five or six inches above it, at or near the west end (where the injury occurred). One witness testified that a few evenings previous

to the night of the injury he noticed the excavation and the guards around it; that the guards extended across the east end, and went part way down the side of O street, the north side across the opening, and went across the west end. The board extended down the side about 16 feet—common fence board. The one at the west end ran across to the corner of the St. Charles hotel; and extended around the corner 7 or 8 feet, perhaps. The examination of this witness was continued as follows:

Q. What was the condition as to the remainder of the way at such times along O street?

A. There was none outside of those mentioned, that I saw.

Q. No guards or boards?

A. No.

Q. What was the distance of that opening where there was no guards or boards along O street?

A. Perhaps 40 feet—40, I should judge.

Q. At such time was the area wall erected?

A. Yes, sir.

Q. And the cellar dug?

A. Yes, sir.

Q. Do you know the condition of that place on the evening or after night-fall on the evening of the 24th of November, or Thanksgiving evening of 1881, if noticed, the night he was injured?

A. It was about the same as it had been two or three days previous.

Q. Did you pass by on that evening?

A. Yes.

Q. How often, if more than once?

A. I came by that evening as I came from work.

Q. That evening?

A. I did not pass by as I remember of; I was out there.

Q. What time in the evening was it you passed by and saw that?

A. Just at dusk.

Q. Was it after or before the men had quit work on the building in and around there?

A. After they had quit work.

Q. Were you in and about the place when the plaintiff was injured?

A. Yes, sir.

* * * * *

Q. What was the condition of that evening, as to light or dark?

A. It was a very dark evening.

Q. What time of the evening was it?

A. I think it was about eight o'clock.

Q. Could you see the man in the cellar?

A. They had a light when I went out; took a lamp with them.

* * * * *

Q. About how far from the north-west corner was it where this man lay; how far from the west end would you judge he was laying that evening?

A. About twenty or twenty-five feet.

Q. Did you notice as to the condition of the guards that evening along opposite on O street from where he fell in?

A. There was none there.

* * * * *

Q. What kind of barriers had been kept along there?

A. There had been posts set between the ground and the stone wall, and boards nailed up against the posts.

Q. Had there been a temporary walk up to the barrier on the outside?

A. Yes.

Q. How close was that walk and temporary barrier to that excavation?

A. Close up to the stone wall.

The plaintiff testified in his own behalf as follows:

Q. On what day did you arrive in the city of Lincoln?

A. I arrived here about four o'clock on the evening of the 24th of November, 1881.

Q. You know the place in controversy, where you received your injuries? State where it is located.

A. It is located on O street, a little west from 8th street, I think, and on the south side of O street.

Q. State when was the first time you ever passed along that side of O street at or near the place where this excavation was.

A. That was the first time I passed along O street—along that part of it. I had been on O street, that evening before dark, from the corner where that furniture store is kept on the west side of Government square. I had been east on Eighth street (evidently meaning O street) to about Sixteenth street, where I turned south.

A. Had you before that time been along the south side of O street, between Seventh and Eighth streets, where this excavation was?

A. I never had; had never before that time seen that excavation.

Q. State at what time in the evening you approached that excavation, and in what direction?

A. It was not far from seven o'clock, as I can remember, and I approached—I left the Oriental Hotel with the instructions there, and was attempting to go to the Union Pacific depot. They told me to go straight north on that street till I got to O street, and when I got there I was to go directly west, when I would reach the Union Pacific depot, to which my daughter was coming; I expected her home. They told me the streets were by letters. I asked if that was O street; they told me it was, and I went directly west.

Q. On the south side of O street?

A. On the south side of O street.

Q. About what kind of a night was it as you were going down there?

A. It was dark and somewhat foggy, as I remember it.

Q. Describe to the jury just how you were precipitated into that excavation. You are the party, are you?

A. I am; there were two gentlemen walking in front of me, perhaps forty feet, and it being quite dark, and supposing that they understood the streets of the town better than I did, was following, as it were, very fast, the sound of their footsteps on the walk.

Q. Which way were they going?

A. West, on O street. There was a light some forty or fifty feet west of where I was, a dim light upon a post, and I observed that these men forty or fifty feet ahead of me were inside the light, next the building. My supposition was that I had got out of the street, and that it was quite dark. I was getting out of the beaten path. I turned to the left, or attempted to turn to the left, and this foot was going on nothing (indicating the left foot). My impression was that I had stepped into a hole, and I attempted to recover myself, I suppose, by my throwing this foot round (the right), and I continued to go down, and landed on the right foot, and then I fell in this position on the right hand (witness illustrates the position), and my head hit something hard about here, above the left temple. The swelling appeared here where my hand is, after; I cannot tell for how long a time. I have no recollection after my head was hit that I lay—I thought for quite a length of time; or I cannot tell anything about the length of time; it might have been a long or a shorter time, but I was quite chilled when I came to myself, and I was not chilled when I fell. My first recollection is, that when I came to myself I was hunting for my hat. I got my hat, and looked above; I could see the light; then I remembered what I was doing when this thing happened, and I could see that I was in a cellar, or some place I was in; I knew it was impossible for me to get out of there, and I began to halloo for help, and I continued so for some time.

* * * * *

Q. State what guard or barrier there was, if any, between the walk and the place where you fell into the excavation, on the night you received the injury.

A. There was none.

There was other testimony, but I have quoted sufficient to show the application of the instructions given and refused upon the two points of the negligence of the city or of the builder in leaving the area open and unguarded, and the contributory negligence of the plaintiff in walking into it.

The following instructions were given to the jury by the court on its own motion :

"I. If you find the injury to the plaintiff complained of was occasioned by the negligence and want of ordinary care of defendant, it then devolves upon the defendant to satisfy you that the negligence and want of ordinary care of the plaintiff contributed thereto to prevent a recovery in the case.

"II. If you find defendant did not use ordinary care and diligence in and about the excavating referred to, and in guarding and protecting the same, and in the use of the street, and you find the plaintiff was injured by want of such ordinary care of the defendant, he cannot recover in this case, if you find the plaintiff in passing and walking along the street or sidewalk therein was guilty of negligence and want of ordinary care, and that such negligence and want of ordinary care on the part of the plaintiff contributed to the injury received, or claimed to be received, by the plaintiff.

"III. Ordinary care on the part of plaintiff is that degree of care and diligence which persons of ordinary prudence would usually use under the circumstances in which the plaintiff was placed at time of falling into the excavation in question.

"IV. A slight want of care and diligence on part of

plaintiff will not prevent a recovery in this case, provided the injury complained of was occasioned by want of ordinary care and diligence of the defendant.

"V. Ordinary care required on the part of defendants is that degree of care which a man of ordinary prudence would usually use under the same circumstances in excavating and using the street in question and guarding and protecting the same so travelers would not be injured during the excavation and use of the street.

"VI. If you find the defendant used ordinary care in and about the excavation and use of the street in question, and guarding and protecting the same, then you will find for the defendant."

The following instructions were given at the request of the plaintiff:

"I. The court instructs the jury that the defendant, the city, is bound by law to use reasonable and ordinary caution, and care, and supervision, to keep its sidewalks and streets in a safe condition for travel by night as well as by day, and if it fails to do so it is liable for injuries sustained in consequence of such failure, provided the party injured is himself exercising reasonable and ordinary care and caution; and the fact that the plaintiff may in some way have caused the injury sustained by him will not prevent his recovery, if by ordinary care he could not have avoided the consequence to himself of the defendant's negligence.

"II. If the jury believe from the evidence that the corporate authorities of the city of Lincoln did not exercise reasonable and ordinary care and supervision over that portion of the streets and sidewalk where the injury in question is alleged to have occurred, to keep it in good and safe condition, and by that means allowed it to become defective and unsafe; and if the jury further believe from the evidence that the plaintiff in attempting to walk along that portion of the street and sidewalk by reason of such

defects was injured, and has sustained damage thereby, as charged in the petition, and that he was at the time exercising reasonable and ordinary care and caution to avoid such injury, then the defendant is liable, and the jury should find for the plaintiff.

"III. The court instructs the jury that while the city has a right to permit lot owners, for the purpose of making improvements, to make excavations or holes in the public streets or sidewalks, yet when it does so it is bound to take notice of the character of such holes or excavations, and the condition in which the streets or sidewalks are left, and if such excavations are dangerous, it is the duty of the city to put up, or cause to be put up, and use reasonable care to keep up, guards or notices of some kind by day, and lights or guards by night, to warn travelers of the condition of the street or sidewalk at such place, and such duty cannot be shifted upon the lot owner or person making the excavation.

"IV. The court instructs the jury that when an excavation has been made in the streets or sidewalks of a city, without the consent of the public, and it is left unguarded and unprotected for such a length of time that the public authorities of the city, in the exercise of reasonable care and prudence, ought to have discovered the fact, then actual notice to such authorities of the condition of the street and sidewalk is not necessary to hold the city liable for injury sustained by a person in consequence of the dangerous condition of the street or sidewalk, if he is himself using reasonable and ordinary care to avoid such injury. [Modified as follows:] 'And does not by his own negligence directly contribute to produce the injury complained of.'

"V. The jury are further instructed that reasonable and ordinary care and caution required of the plaintiff, as mentioned in these instructions, means that degree of care and caution which might reasonably be expected from an

ordinary, prudent person under the circumstances surrounding the plaintiff at the time of the alleged injury; that the plaintiff was bound to exercise only ordinary care, and that slight negligence will not defeat his recovery for an injury received in consequence of a defect in the street. If the city authorities were guilty of negligence and want of ordinary care in permitting a dangerous excavation to be made, and remain unprotected in a publicly traveled street. [Modified as follows:] 'And you find the plaintiff's negligence did not directly contribute to produce the injury complained of.'

"VI. If the jury believe from the evidence that the plaintiff was injured by reason of the defendant's negligence and want of ordinary care in failing to keep its sidewalks and streets in reasonably good repair, or negligently allowing the same to remain in an unsafe condition, as explained in these instructions, and without fault on his part, and that he has sustained damage, then the jury has a right to find for him such an amount of damages as the jury believe from the evidence will compensate him for the personal injuries so received, and for his loss of time in endeavoring to be cured, and his expenses necessarily incurred in respect thereto, if any such loss or expenses have been proved, and also for the pain and suffering undergone by him, and any permanent injury, if any such has been proven."

The following instructions, prayed for by the defendant, were given:

"I. While the plaintiff had a right to presume that defendant's sidewalks were in good repair, and was only bound to exercise ordinary care, yet if the jury find from the evidence that the plaintiff was apprised and knew of the excavation in the sidewalk, by a barricade across the same, or otherwise, before receiving the alleged injury, then the presumption of good repair ceased, and you will find for the defendant, unless you further find that the plaintiff thereafter exercised extraordinary care and precaution, and

was so exercising extraordinary care and precaution at the time of this alleged injury.

"II. If you find from the evidence that the plaintiff was apprised of the excavation by the barriers placed across the sidewalk just before receiving the alleged injury, you will find for the defendant, unless you further find that the subsequent negligence of the plaintiff in no way contributed to the alleged injury.

"III. The mere fact that the defendant city permitted an excavation to be made and exist in the sidewalk was not of itself negligence, but suffering it to be made and exist without suitable protection would be negligence, and if the jury believe from the evidence the excavation was, on the evening of the day of the alleged injury, surrounded by a suitable, substantial protection, or barricade, then you will find for the defendant, unless you further find that the city was notified that said barricade, or a portion of it, had been removed and had sufficient time to repair the same before the alleged injury occurred.

"IV. The jury are instructed that, while it was the duty of the city to keep its sidewalks in repair for safe passage, yet it had the right to permit the excavation to be made under the sidewalk, so long as it did not interfere with the public interest, and the city would only be liable in case of negligence in permitting the excavation to remain open and unprotected by suitable barriers. And if the jury believe from the evidence that the excavation into which the plaintiff claims to have fallen and received the alleged injury was surrounded by barriers sufficient to apprise a person exercising ordinary care while passing along the sidewalk, of the excavation, then you will find for the defendant.

"V. The plaintiff was bound to exercise ordinary care for his personal safety while passing along the sidewalk of the defendant, and if the jury believe from the evidence that plaintiff's slight negligence contributed to the alleged injury, then you will find for the defendant. [Modified

as follows:] ‘Although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant’s negligence—if you find there was negligence on part of defendant which caused the injury to plaintiff complained of—he, the said plaintiff is entitled to recover in the case.’

“VIII. The jury are instructed that ordinary care is that degree of ordinary care which a person of ordinary prudence is presumed to use under the particular circumstances to avoid injury. It must be in proportion to the danger to be avoided and the fatal consequences involved in its neglect.”

The following instructions, prayed by the defendant, were refused by the court:

“If the jury believe from the evidence that there was a slight want of ordinary care on the part of the plaintiff, which slight want of ordinary care contributed to the injuries complained of, the plaintiff cannot recover, unless the jury further find the negligence on the part of the defendant was so gross as to justify the jury in finding that the alleged injury was caused by the willful and malicious act of the defendant or its agents or servants.

“VII.* The jury are instructed as a matter of law that if the plaintiff was guilty of any negligence, however slight, which contributed to the injury complained of, he cannot recover. [Modified as follows:] ‘Provided such negligence directly contributed to the injury complained of.’

“IX. The jury are instructed that before the plaintiff can recover in this action it is incumbent upon him to show that no negligence of his contributed to the injury damages for which are claimed herein, and that upon him, the plaintiff, rests the burden of proof of the absence of such contributory negligence.”

* NOTE.—The writer of this opinion is unable to tell from the record whether the above instruction, No. 7, was given as modified or not.

The jury found for the plaintiff, and assessed his damages at \$1,200.

A motion for a new trial was overruled.

The opinion of the court upon the hearing of this case was chiefly directed to the consideration of the question of the burden of proof of contributory negligence on the part of the plaintiff, under the pleadings and evidence in the case. And the argument of counsel at the rehearing was addressed principally to this point.

As it is conceded by the writer of the original opinion in the case that there is a conflict of authority as to whether contributory negligence on the part of the plaintiff is a matter to be disproved or negatived by the plaintiff in presenting his case, on pain of being non-suited, or whether it is a matter of defense, strictly, which the plaintiff may ignore, unless presented by the defendant, and the court having stated the rule which it was thought best to follow in such conflict of authority, it will be adhered to, unless upon careful review it shall be found illogical, or calculated to lead to injustice. The rule thus stated is as follows: "That if the plaintiff can prove his case without showing contributory negligence, it is a matter of defense to be proved by the defendant."

This rule is stated by the supreme court of the United States in the case of *Indianapolis & St. Louis Railroad Company v. Horst*, 93 U. S., 291, in the following language: "Where the evidence on the part of the plaintiff does not tend to establish contributory negligence on his part, and the court charged that the burden of proving it rested on the defendant, and that it must be established by a preponderance of the evidence, the charge was not erroneous." The supreme court of Wisconsin in the early cases of *Chamberlain v. The Milwaukee and Mississippi Railroad Co.*, 7 Wis., 425, and *Dressler v. Davis*, Id., 527, the latter case cited by counsel for defendant in their brief, held that "In general, where a party sues for an in-

jury to him, occurring through the alleged carelessness or negligence of the defendant, he must show that he was not guilty of negligence on his part." This rule was adhered to in the case of *Milwaukee & Chicago Railroad Company v. Hunter*, 11 Id., 167, but the reasoning of the opinion by Judge Paine is strongly against it. The next case in which the point was considered by that court was that of *Achtenhagen v. The City of Watertown*, 18 Id., 331, in which the rule is materially changed, if not reversed. I quote from the syllabus. "In an action for an injury sustained through the negligence of the defendant the plaintiff is not bound in the first instance to show that he himself was not guilty of negligence, which contributed to the injury, but it is enough if the proof introduced and the circumstances attending the injury established *prima facie* that it was occasioned by the negligence of the defendant. But if the plaintiff's own evidence raises an inference of negligence against himself, he must, in order to establish a *prima facie* case, show that he was guilty of no negligence."

In the case of *Hoyt v. The City of Hudson*, 41 Id., 105, the same court stated the rule as follows: "In an action for injuries from negligence, where there is nothing in plaintiff's evidence tending to show contributory negligence, the *presumption* is against it, and the burden of proof is upon the defendant. If contributory negligence conclusively appears from plaintiff's own evidence, he will be non-suited, while if the evidence merely *tends* to show such negligence, the question will be for the jury."

The rule thus laid down is explained and adhered to in *Prideaux v. The City of Mineral Point*, 43 Id., 513. The court, by C. J. Ryan, says, in speaking of the said case: "The rule intended in that case is, that a plaintiff giving evidence of the negligence of the defendant and the resulting injury to himself, without showing any contributory negligence, is bound to go no further—he is not required to negative his own negligence. If, however, the

plaintiff in proving the injury shows contributory negligence sufficient to defeat the action, he disproves his own case of injury by the negligence of the defendant alone. If the plaintiff's evidence leaves no doubt of the fact, his contributory negligence is taken as matter of law to warrant a non-suit. If the plaintiff's evidence leaves the fact in doubt, the evidence of contributory negligence on both sides should go to the jury."

The rule as above explained is adhered to in *Randall v. The Northwestern Telegraph Co.*, 54 Id., 140, and in *Kelly v. Chicago & N. W. Ry. Co.*, 19 N. W. Rep., 521.

This question came before the supreme court of Missouri in the case of *Thompson v. The North Missouri Railroad Company*, 51 Mo., 190. In that case the circuit court had sustained a demurrer to the petition because there was no averment that the plaintiff at the time was exercising due care, and was himself without negligence contributing to the injury. The judgment was reversed, the court in the opinion saying: "Negligence on the part of the plaintiff is a mere defense to be set up in the answer and shown like any other defense, though of course it may be inferred from the circumstances proved by the plaintiff upon the trial."

While there are many cases holding to the contrary, it cannot be denied that the rule laid down by this court in the original opinion is sustained by sufficient authority, is sufficiently logical and reasonable. And I think it free from the charge of tending to injustice.

Assuming the above conclusion to be correct, I think the instructions to the jury in the main correct upon the subject of contributory negligence and the burden of proof.

Counsel for plaintiff in error contends that by the giving of instruction No. 1, the court withdrew from the consideration of the jury the evidence of plaintiff below, which tended to show a want of ordinary care on his part.

As we have seen in the case of *Prideaux v. The City of Mineral Point*, *supra*, a case upon which this court relied among others in the conclusion to which it arrived upon the point above considered, the learned court say, in explaining the rule in *Hoyt v. Hudson*, *supra*: "It does not put the *onus probandi* in all cases upon the defendant, as the learned judge appears to have stated. The rule intended in the case is, that a plaintiff giving evidence of the negligence of the defendant and the resulting injury to himself, without showing any contributory negligence, is bound to go no further. He is not bound to negative his own negligence. If, however, the plaintiff in proving the injury shows contributory negligence sufficient to defeat the action, he disproves his own case of injury by the negligence of the defendant alone."

However the instruction complained of might have been intended by the judge who gave it, or might be understood by a lawyer, I think the jury may well be supposed to have understood it to mean that if they believed the statement of the plaintiff as to the facts and circumstances of his injury, as given in his evidence, they must then, in order to defeat his recovery, find from the evidence given on the part of the defendant "that the negligence and want of ordinary care of the plaintiff contributed" to the injury. This instruction can only be sustained, if at all, upon the assumption that as matter of law there was nothing in the evidence on the part of the plaintiff that tended to show contributory negligence on his part.

The plaintiff, according to his own evidence, was in a strange city, and in a part of it where he had never been before. The night was so dark that his eyesight did not enable him to keep on his way, and so he followed the sound of the footsteps and voices of two men going the same way, and some forty feet ahead of him. I quote further from the plaintiff's testimony on his cross-examination, counsel taking a plat and referring to the same in the examination.

Q. When you came down here did you not find a walk turning off there to go round this excavation?

A. It may have done so.

Q. Don't you know it did so?

A. It was dark, I could not say, and I was not back there again.

Q. But you was walking here when you took this to be the front of the building?

A. If this is O street I came down here.

Q. This is the street running here; this is supposed to be the street laying here; that is the area wall standing there—that black wall; that is the west side of the building—that point there; and this is the east side.

WITNESS. This is where the St. Charles is?

MASON. Yes.

Q. Where were you when you fell off this building. This is the east end of the cellar here; this is the sidewalk laying out here (marked sidewalk); this is the temporary walk; that is the area wall; this is O street; and this out here is O street. Where were you when you fell off?

A. I must have been fifteen feet from that corner of the cellar, or somewhere about it. That would make it there, would it not? (indicating on the plat to the north-west corner.)

Q. You think you was more than fifteen feet?

A. I cannot tell.

Q. Which way were you traveling?

A. I was going west.

Q. Well, now; when you struck this barrier up here, you came down here and struck this barrier. There was a barrier, was there not, there? Did you not see any barrier there? When you came down O street you came on the sidewalk down O street above here?

A. I did.

Q. Was it downhill or uphill?

A. I think it was downhill a little.

Q. Did you observe this barrier when you struck it here?

A. I did not.

Q. You swear there was not a barrier there, or that you did not see any.

A. My recollection is I turned a little to the right, following these two men.

Q. Where were the two men?

A. They were in front of me about forty yards.

Q. What makes you think about forty yards?

A. I could hear them talking—the sound of their voices, and the sound of their feet on the sidewalk.

Q. Could you measure the distance by the sound of voices ahead of you?

A. Certainly not.

Q. And could you measure the distance by the sound of their feet on the sidewalk?

A. It would give me an idea of the distance.

Q. Could you see them at all?

A. I think I could see the outline of them.

Q. Then you were following the outline of them, were you?

A. And the sound of their voices and their feet.

Q. These two men you were following, which way were they going?

A. They were going west.

Q. At the time were they in the light of this lamp down here, or of a lamp?

A. They were some distance on there to the left of me near to the lamp and the St. Charles Hotel.

Q. Between the lamp and building?

A. Yes.

Q. And when you walked off the walk you struck a straight line for them.

A. I turned a little to the left in order to go where the men were; I thought I had got too far in the street.

Q. You turned to the left in order to go where these men were?

A. Yes, sir.

Q. When you turned to the right up here were you following these men, you swore you were turning to the right here. Now were you following these two men?

A. I was following the two men, supposing they knew the streets better than I did, I followed after them.

Q. Then you were just following after these two men—that is the fact, ain't it?

A. I was governing my motions somewhat by theirs. I tried to explain in answer to —

Q. Never mind—answer me now. I want you should tell me when you turned here if you turned in consequence of this barrier, or you turned simply to follow these men?

A. My recollection is I noticed there was a turn in the street there. At the same time I followed the men round, I noticed the men turned, and I followed them, and was governing my motions by theirs.

Q. The same was true when you turned here (indicating on the plat), you was governing your motions by theirs?

A. I remember having the impression that I had got out on the street rather, because they were further to my left; I having that impression.

Q. What else do you remember?

A. I remember following.

Q. Which way was you looking? You had your eyes on these men. You remember of seeing them, don't you?

A. Yes, I was looking obliquely to the left.

Q. You were looking at these men, weren't you?

A. I was looking at them. I could see the dim outline of them at the time, and followed the men.

Q. Obliquely to the left?

A. I could hear the sound of their voices, and I thought I saw the outline of them inside of that lamp.

Q. That was at the time you followed. Could you not at that time have seen the walk if you had looked down on the walk?

A. I don't think I could.

Q. Will you swear you could not?

A. I don't think I could see the walk.

Q. Did you not answer or swear a few moments ago that you could see the dim outline of these men for forty feet?

A. I said by the lamp I could. I could hear their voices, and hear the sound of —

Q. Did I not ask you what made you turn up here, and you told me you did not see any barrier, but you saw the dim outline of these men and you were following them?

A. My recollection is not clear about that. I am confident that I was following them more from the sound of their voices and the sound of their feet than anything else.

Q. But you did not testify, or your recollection is not clear as to what you did testify on that point. Is that what you mean to say? I ask you if you did not testify to me that you was following them because you could see the dim outline of them? After I pressed you about following from the walk where you stepped off, did you not tell me you could see the dim outline of them?

A. I don't remember.

Q. Are you willing to swear that if you had been looking down at the plank that night, that you could not have seen the plank?

A. I don't think I could along here. I might if I had been down by the lamp.

Q. Are you willing to swear that you could not have seen the plank in any place—without a lamp, I mean?

A. Not definitely.

Q. Was it any lighter when you left the Oriental Hotel than it was when you fell off?

A. I don't remember.

* * * * *

Q. Now when you did fall into the cellar, you turned sharply to the left, did you, to go in the direction of these men?

A. I turned a little to the left—in that direction.

Q. Did you turn obliquely to the left? What I mean is, did you turn sharply and walk directly in that direction, or did not walk obliquely to the left gradually? Did you make a right angle?

A. I made one step in that direction and that foot went down.

* * * * *

Q. Were you on the ground or on the plank when you took that step?

A. I could not be certain.

* * * * *

Q. And you took that step in order to head in the direction of these men you saw?

A. I did.

Q. And these men you saw were between the St. Charles Hotel and the light?

A. They were.

Q. And you turned in that direction in order to go directly in the direction where these men stood? That was your motive, was it not?

A. I made the step to the left, thinking I had got too far into the street, and I thought that by seeing the men so far to my left.

Q. And they were the dogs, if such I may call them, that made you turn off in that direction?

A. They had something to do with it, yes.

* * * * *

Q. Do you still insist on swearing that that night you did not see a barrier on here?

A. I may have seen them.

Q. Do you still insist on swearing that you saw no guard there (counsel pointed to the eastern runway on the blotting-paper plat)?

A. I don't remember of—I don't remember to have seen any guard there.

Q. Do you still insist upon swearing that there was no guard there? Do you say you might have seen that barrier there (indicating on the plat the end of Eighth street)?

A. I remember this, that I turned to the right there. I may have seen a barrier, but I don't remember it.

Q. You say you may have seen the barrier?

A. I remember turning to the left, and may have seen an obstruction there—or to the right I mean, in place of the left.

* * * * *

Q. You did not see any poles or buildings there at all, did you?

A. I don't remember.

Q. You did not see that house in the street at all, against which the first barrier was nailed (taking a plat and referring to it)—this one? You did not see that house there, did you?

WITNESS—This is the sidewalk running down there.

MASON—Yes, this is the street off here.

A. I think I did see a house there.

Q. In the street?

A. I think so.

Q. You think you saw this barrier?

A. Yes.

Q. Did you see the Metropolitan lights across the street?

A. I don't remember, but I think I saw lights. I do not remember for certain, but I think I saw lights on the opposite side of the street.

Now can it be said as matter of law that there is nothing in the above testimony of the plaintiff which tends to

show contributory negligence on his part? The court told the jury in the first instruction prayed by the plaintiff in error, that if the jury should find from the evidence that plaintiff was apprised and knew of the excavation in the sidewalk by a barricade across the same, or otherwise, before receiving the alleged injury, then the presumption of good repair ceased, and that they should find for the defendant, unless they should further find that the plaintiff thereafter exercised extraordinary care and precaution, and was so exercising extraordinary care and precaution at the time of the alleged injury. Had this instruction not been entirely nullified by the first instruction above quoted, could the jury have found that the plaintiff was in the exercise of extraordinary, or even of ordinary care and precaution, when as testified by him he had seen the barrier across the sidewalk, and having turned to the right and pursued his course in or near the middle of the street for a short distance, he turned sharply to the left and walked into the excavation without feeling his way so as to avoid the same? I think not. Again, I do not think that the jury, had they considered the question before them, could have found the plaintiff to have been in the exercise of extraordinary, or even of ordinary, care and caution, when through the streets of a strange city on a dark night he followed the dim outline and the sound of the voices and footfall on the sidewalk of two strange men. Certainly he could shift no part of his own duty to the shoulders of these two men.

But the real point is, did the testimony of the plaintiff tend to show contributory negligence on his part? If so, it was matter proper for the consideration of the jury, and should not have been taken from them, as I think it was by a construction of the first instruction, which I think the jury were warranted in placing upon it, and actually did place upon it.

Read together, the two instructions (No. 1 of instruc-

tions given by the court on its own motion, and No. 1 of instructions given at the request of plaintiff below) not only nullify each other, but they do withdraw from the consideration of the jury the circumstances detailed by the plaintiff, which I think tend to prove contributory negligence. Negligence is the absence of care, and *vice versa*. Extraordinary care is, therefore, the absence of slight negligence, and the jury are told in effect that it being proved that the injury resulted from the negligence of the defendant, the burden devolved upon the *defense* to show by evidence offered on its part that under the circumstances the plaintiff was guilty of at least slight contributory negligence. To so instruct them was to direct their attention upon this branch of the case solely to the defendant's testimony, or rather lack of testimony, and to advise them that if from scanning that alone, they did not find proof of slight negligence on the part of the plaintiff, the latter would be entitled to recover. Such a rule, if carried to its logical limits, would leave a defendant powerless, or at the mercy of the individual opinion of the presiding judge in every not extreme case, in which he is obliged to depend upon a cross-examination of the plaintiff and his witnesses for a disclosure of his adversary's negligence, causing or contributing to the injury complained of. Such, in an extreme case, would probably not be contended for as being the law, but whatever rule is adopted must be applicable alike to extreme cases, and those which would not be so regarded, otherwise the determination as to what rule shall be applied in a particular case will depend upon the decision of the presiding judge as to what class it falls into, and this would be to commit the decision of causes to mere caprice. It follows, therefore, of necessity, that in every action of this kind, in which there is anywhere in the record *any* evidence tending in any degree to prove the existence of contributory negligence, the jury must be left to determine from all the evidence before them whether or not it in fact existed.

In the case of *Railroad Co. v. Stout*, 17 Wall., 657, the supreme court of the United States, in approving an instruction by the trial court, whereby a question of contributory negligence was left to the jury, say: "Upon the facts proven in such cases, it is matter of judgment and discretion of sound influence what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed. Another man, equally sensible, and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. * * * It is assumed that twelve men know more of the common affairs of life than does one man. That they can draw wiser and safer conclusions from admitted facts thus occurring than a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

The above case was cited with approval and followed by this court in the case of *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332, which latter case was approved and followed in that of *Huff v. Ames*, 16 Id., 139.

I am therefore of the opinion that the court erred in giving the instruction number 1 of instructions given by the court on its own motion, and that for such error there ought to be a new trial.

THE STATE OF NEBRASKA, EX REL. THE ATTORNEY GENERAL, v. THE FARMERS AND MECHANICS MUTUAL BENEVOLENT ASSOCIATION OF LINCOLN, NEBRASKA, J. C. MCBRIDE, J. GILLESPIE, H. V. HOAGLAND, JOHN CURRIE, GEO. W. FLETCHER, AND J. B. TOMLIN.

1. **Insurance: CONTRACT DEFINED.** A contract by which one party for a consideration promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the sum to be paid by the insurer in the event of loss.
2. ———: **CASE STATED.** Upon the facts appearing in the record, *Held*, That defendant was a mutual insurance company, and as such must comply with the provisions of the act of June 1st, 1873, and receive the certificate of the auditor of the state before transacting business.

QUO WARRANTO.

William Leese, Attorney General, and N. K. Griggs, for relator.

Harwood, Ames & Kelly, for respondent.

REESE, J.

This is an original proceeding, instituted for the purpose of ousting defendants from transacting the business of life insurance.

The information alleges in substance that defendant association is now and has been for some time transacting the business of life insurance within the state, and issuing policies or certificates of insurance upon the lives of persons within the state. That it has not complied with the

laws of the state relating to the transaction of the business of life insurance, and has not at any time obtained a certificate from the auditor of the state permitting it to transact such business, and that it has no authority of law to engage therein. That defendants McBride, Gillespie, Hoagland, Currie, Fletcher, and Tomlin are the officers of said association, and as such are soliciting risks and effecting contracts of insurance in its behalf. Exhibits are attached showing the form of "application for membership," "certificate of membership," "security note," "receipt for membership fee," circulars, etc., in use by defendants for the purpose of effecting the issuance of indemnity or insurance upon the lives of persons.

The answer consists alone of the denial "that the defendant, the Farmers and Mechanics Mutual Benevolent Association, has not complied with the laws of the state of Nebraska relating to the transaction of the business of life insurance within said state."

Upon the argument it was conceded by defendants that no certificate or permission of the auditor had been issued to them as is required by law to be issued to insurance companies, but it was contended that no such certificate was necessary. That defendant association is not an insurance company in contemplation of law, and therefore is not within the restrictions and prohibitions of the act of 1873 (chapters 16 and 43, Compiled Statutes, 1885).

The certificate of membership, omitting the name of the assured, is as follows:

"Farmers and Mechanics Mutual Benevolent Association, incorporated under laws of Nebraska, October 13th, 1884, Lincoln, Nebraska. This certificate of membership witnesseth and declares:

"That in consideration of the representations and agreements made in the application for this certificate of membership, and bearing even date herewith, which is made a part of this contract, the payment of an admission fee of

State v. Farmers Benevolent Association.

not exceeding ten dollars, the payment of one dollar and seventy-five cents on or before the 16th day of May, 1885, and the same amount semi-annually thereafter, and the payment on or before maturity of such benefit assessments as may be legally levied by the board of directors, the Farmers and Mechanics Mutual Benevolent Association issues this certificate of membership, and constitutes, of, county of, state of Nebraska, a member of said association with all the rights and privileges thereof, subject to the following conditions and agreements and the provisions of the by-laws of said association.

"DEATH BENEFIT.

"Upon the receipt at the office of the association in Lincoln, Nebraska, of satisfactory proofs of the death of said member, he having conformed to all the conditions of membership, this association will pay to, or the legal heirs of said member, the net proceeds of one full assessment at schedule rates upon all contributing members at date of such assessment, and which is received at the Lincoln office within thirty days from the date of the notice thereof to an amount not exceeding five thousand dollars, to be paid within thirty days thereafter at the office of the association at Lincoln, Nebraska.

"PERSONAL BENEFIT.

"And this association further agrees that whenever this certificate shall have been maintained in full force by the prompt payment by the said member on or before maturity of all dues and assessments for the period of ten full consecutive years, this certificate may then mature, in which case this association will then pay to the said member personally, the net proceeds of a half assessment at schedule rates upon all contributing members at that date, and which is received at the Lincoln office within thirty days from date of the notice of assessment thereof, not exceed-

ing two thousand dollars; *Provided*, That upon payment of said amount this certificate shall be canceled and surrendered to this association; and *Provided further*, If the said member shall allow his certificate to lapse from any cause whatever, that the time of estimating when said ten years shall commence to run shall date from the date of his restoration to membership, and not from the original date of certificate; *Provided*, The member shall not be assessed for this benefit, nor be entitled to the same, unless he has specially made application for this benefit when applying for membership.

"ACCIDENT BENEFIT—CLASS THREE.

"It is further stipulated, that in case the member above has been in good standing in this association for a period of six full consecutive months and becomes disabled by accident not contracted in an immoral way, so as to be unable to perform any ordinary business or duties of life, he shall be entitled to receive ten dollars per week while so disabled, provided that no sickness of less than one week shall be considered, and fractions of a week shall not be counted; and to pay this accident benefit and incidental expenses not otherwise provided for, a full assessment shall be made from time to time, as necessity may require, but no one person shall receive an accident benefit for a greater time than ten weeks at any one time for any one accident, nor shall they be paid exceeding the net proceeds of one full assessment.

"The special conditions on the back of this certificate are made a part hereof and binding on both parties.

"This certificate is for a personal benefit and is for an accident benefit and is——subject to assessments for personal and accident benefits as provided herein, and in the By-Laws of the association.

"In witness whereof the said Farmers and Mechanics Mutual Benevolent Association has caused this certifi-

cate of membership to be signed by the president and countersigned and sealed by the secretary, at the office of the association in Lincoln, Lancaster county, Nebraska, this 16th day of March, 1885.

“.....

.....
President.

“Secretary.”

The special conditions referred to as on the back of the certificate are too lengthy to be copied here, but it may be stated briefly: That the mailing of a printed or written notice to a member shall be considered a legal notice. The association reserves the right to make special assessments for the purpose of paying accident benefits and to pay for the expenses of the association not otherwise provided for. The name of the beneficiary may be changed upon written request of the member, the surrender of the certificate, and the payment of two dollars and fifty cents, and the issuance of a new certificate. Notice of the death or disability of the member shall be sent to the office of the association within ten days from the time of death or disability. If the certificate becomes void from any cause, all payments made thereon are forfeited to the association. Accident benefits may be waived upon application to the secretary. When a member fails to pay his dues or assessments his security note becomes due and payable. The member forfeits all rights in the association, by failure to pay assessments within thirty days from their date, the failure to pay semi-annual dues within thirty days after they become due, the immoderate use of alcoholic liquors, or the concealment or misrepresentation of any material facts as to health when applying for membership, the perpetration or attempt to perpetrate any fraud on the association by the member, his beneficiary or any one having an interest in the certificate, and the graduated schedule of rates, in blank, depending upon the age of the members.

That this is a contract of insurance, cannot, we think,

in the light of the almost, if not quite, uniform holdings of courts and opinions of text writers, be doubted.

In *Commonwealth v. Wetherbee*, 105 Mass., 149, it is held that "a contract by which one party for a consideration promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest is a contract of insurance, whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the sum to be paid by the insurer in the event of loss; and although the object of the insurer in making the contract is benevolent and not speculative." The contract does not differ in any essential feature of form or substance from a contract of insurance. The subject insured is the life or health of the member. The assured pays a certain sum, ten dollars, at the inception of the contract, which is fixed by the insurer (association), a promise to pay assessments punctually, when called for, is made by the assured, together with stipulated semi-annual dues which are fixed by the directors. Upon the condition of these payments being promptly made the insurance is made to depend. At the death of the member (assured), upon proof of the fact within ten days thereafter, the beneficiary is to receive a sum of money not exceeding five thousand dollars. This is none the less an insurance because the amount to be paid is not a gross sum, but graduated by the number of "contributing members" at the date of the assessment therefor; nor because the contract provides no legal method of enforcing payment of the assessment necessary to provide for the payment of the "death benefit," but merely declares the contract of membership at an end and all payments made thereon forfeited to the company.

The courts have with a great degree of unanimity treated all such organizations as substantially life insurance companies, applying to them and to the mutual relations of the members the rules and principles applicable to the contract

of life insurance. May on Insurance, § 550. See also, *Bolton v. Bolton*, 73 Me., 299. *State v. Standard Life Association*, 38 Ohio State, 281. *State v. Miller et al.*, 23 N. W. Rep., 241. *State v. Bankers, etc., Association*, 23 Kas., 499. *Arthur v. Odd Fellows Association*, 29 Ohio State, 557. *Illinois Masons Benevolent Society v. Winthrop*, 85 Ills., 537. *Same v. Baldwin*, 86 Id., 479. *Shunk v. Gegenseitiger, Wittman & Co.*, 44 Wis., 369. *State v. Live Stock Association*, 16 Neb., 552.

It is virtually conceded by defendant in its brief and argument that the rules governing life insurance companies must be applied to defendant, but a vigorous attack is made upon the law of this state upon the subject of insurance, and it is claimed that the act above referred to is intended to crush out organizations like defendant, in the interest of what are usually termed the "old line" companies. It is nowhere suggested that the act is unconstitutional, nor that it was not legally passed by the legislature. Such being the case, we cannot inquire into the propriety of the action of the legislature, but must accept and enforce the law as we find it.

Since defendants have not complied with the provisions of section 6 of chapter 16, and sections 7 and 8 of chapter 43 of the Compiled Statutes, (being an insurance company against accident) they have no authority to transact the business in which they are engaged, and judgment must be entered in accordance with the prayer of the petition.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	283
51	33
51	210
54	100

THE STATE OF NEBRASKA, EX REL. WILLIAM GRADY,
V. THE BOARD OF COUNTY COMMISSIONERS OF LIN-
COLN COUNTY.

1. **Counties and County Officers.** Counties and county boards can only exercise such powers as are expressly granted by statute, and such grant of power must be strictly construed.
2. ———: **BONDS FOR JAIL.** Under the provisions of the law of 1879, now in force, county commissioners have no authority to issue county bonds for the purpose of raising money to build a jail, and a vote of the people of the county instructing them to issue such bonds will confer no authority so to do.

ORIGINAL application for mandamus.

Snelling & Talbot, for relator.

Hinman & Nesbitt, for respondent.

REESE, J.

The question presented for decision in this case is, whether or not counties have authority to borrow money by the issuance of bonds, for the purpose of constructing a county jail.

It is well settled in this state that counties have no inherent power, and that their commissioners, or agents, acting for them, have only such powers, generally, as are especially granted to them by statute, or such as are incidentally necessary to carry into effect those which are granted. *Hallenbeck v. Hahn*, 2 Neb., 397. *S. C. & P. R. R. Co. v. Washington County*, 3 Id., 42. *Sexson v. Kelly*, Id., 107. *The People v. Commissioners of Buffalo County*, 4 Id., 157. *Hamlin v. Meadville*, 6 Id., 283. *The State, ex rel., v. Buffalo Co.*, Id., 460. *McCann v. Otoe County*, 9 Id., 381. *Walsh v. Rogers*, 15 Id., 311. And the grant of power must be strictly construed. *S. C. & P.*

R. R. Co. v. Washington County, *supra*, and cases there cited. *Sezson v. Kelly*, *supra*. *The People v. Commissioners of Buffalo County*, *supra*. *Commissioners of Hamilton County v. Mighels*, 7 Ohio State, 115. *Treadwell v. Commissioners*, 11 Id., 190.

In *Hamlin v. Meadville*, *supra*, Judge MAXWELL, in writing the opinion of the court, says: "Whatever may be the rule as to municipal corporations, counties have no authority at common law to issue bonds. - They are *quasi* corporations, mere governing agencies charged with certain objects of necessary local administration. The power to issue commercial paper must be conferred by statute, and such power must be exercised in the manner prescribed."

There being no question then upon the necessity of the grant of power before authority exists, it is only necessary to examine the statute and ascertain whether the grant has been made.

Defendants insist that the second subdivision of section 25, and sections 26 to 31, inclusive, of chapter 18 of the Compiled Statutes of 1885, gives the authority to them to issue the bonds. The second clause of section 25 provides that it shall be the duty of the county board of each county "to erect or otherwise provide, when necessary, and the finances of the county will justify it, and keep in repair, a suitable court-house, jail, and other necessary county buildings, and to provide suitable rooms and offices for the accommodation of the several courts of record, the county board, clerk, treasurer, sheriff, clerk of the district court, and county superintendent, and to provide suitable furniture therefor. But no appropriation exceeding fifteen hundred dollars shall be made for the erection of any county buildings, without first submitting the proposition to a vote of the people of the county at a general election, and the same is ordered by two-thirds of the legal voters voting thereon."

The other sections referred to are as follows:

"Sec. 26. Whenever the county board shall deem it necessary to assess taxes the aggregate of which shall exceed the rate of one dollar and fifty cents per one hundred dollars valuation of the property of the county, except when such excess is to be used for the payment of indebtedness existing at the adopting of the constitution, the county board may, by an order entered of record, set forth substantially the amount of such excess required and the purpose for which the same will be required, and if for the payment of interest or principal, or both, upon bonds, shall in a general way designate the bonds and specify the number of years such excess will require to be levied, and provide for the submission of the question of assessing the additional rate required to a vote of the people of the county, at the next election for county officers after the adoption of the resolution. If the proposition for such additional tax be carried, the same shall be paid in money, and in no other manner."

"Sec. 27. The mode of submitting questions to the people for any purpose authorized by law, shall be as follows: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty of its violation if there be one, is to be published for four weeks in some newspaper published in the county. If there be no such newspaper the publication must be made by being posted up in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such question will be voted upon and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of the election."

"Sec. 28. When the question submitted involves the borrowing or expenditure of money or issuance of bonds,

the proposition of the question must be accompanied by a provision to levy a tax annually for the payment of interest, if any, thereof, and no vote adopting the question proposed shall be valid unless it likewise adopt the amount of tax to be levied to meet the liability incurred."

"Sec. 29. At the time specified in such notice a vote of the qualified electors shall be taken in each precinct at the place designated in such notice. The votes shall be received and returns thereof made, and the same shall be canvassed by the same officers and in the same manner as required at each general election."

"Sec. 30. If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the county board."

"Sec. 31. Money raised by the county board in pursuance to the provisions of the preceding sections of this act is specially appropriated and constituted a fund distinct from all others in the hands of the county treasurer, until the obligation assumed be discharged."

It could serve no good purpose to enter into an analysis of these sections. It is enough to say that nowhere is the authority given as claimed by defendants. While it is true that by section twenty-five it is made the duty of the commissioners to provide a county jail, yet this duty is made to depend upon the fact that the "finances of the county will justify it." It is contemplated that if the money is in the treasury it may be appropriated for that purpose. But no appropriation exceeding fifteen hundred dollars shall be made without being authorized by a vote of the people.

It might and doubtless would be proper for the commissioners after having made the proper estimate, to levy a tax upon the taxable property of the county to increase the funds of the county sufficiently for the appropriation to be made, or, in case that would exceed the constitutional limit, the levy might be increased by the authority of the vote of the people to an amount sufficient for the purpose. But no authority is given anywhere to *borrow* the money by the issuance of bonds.

It is contended that this question has been decided in favor of the position of defendants by this court in the *B. & M. Ry. Co. v. Clay County*, 13 Neb, 367. But we cannot so hold. It is true it was decided in that case that "the authority conferred upon the county commissioners when funds are needed to aid in the construction of county buildings is to borrow money for a specific purpose upon the credit of the county." But it will not do to lose sight of the fact that at that time there was an act of the legislature in force expressly giving that power. This authority was conferred by the fourth clause of section 14 of the act of February 27th, 1873, which provided that the board of county commissioners should have power to "apportion and order the levying of taxes as provided by law, and to *borrow upon the credit of the county* a sum sufficient for the erection of county buildings," etc. General Statutes, 234. This power was swept away by the repeal of the law in 1879, when our present law concerning "counties and county officers" was enacted.

We therefore hold that the bonds issued by the defendants are void, and they should be destroyed.

No objection is made upon the ground that mandamus is not the proper remedy in this case. A writ of mandamus is therefore awarded as prayed for.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CALVIN H. PARMELE, PLAINTIFF IN ERROR, V. JASPER
W. CONN, DEFENDANT IN ERROR.

1. **Verdict Sustained.** The verdict of a jury upon question of fact where the testimony is conflicting will not be set aside unless clearly wrong.
2. ———: **PARTNERSHIP.** So where one of the questions involved in a cause submitted to the jury was, whether or not a partnership relation existed between the parties to the suit, and upon the facts stated by some of the witnesses the jury could find that a partnership did not exist, and they so found, such finding will not be molested. And the same rule will be applied to all cases where there is conflicting testimony upon material or vital points in the case.

ERROR to the district court for Cass county. Tried below before POUND, J.

A. Beeson and Sam M. Chapman, for plaintiff in error, cited: *Leabow v. Renshaw*, 61 Mo., 292.

Crites & Ramsey, for defendant in error.

REESE, J.

There is but one error assigned in the petition in error, which is, that "the court erred in overruling the motion for a new trial," and as said in *Thrailkill v. Daily*, 16 Neb., 115, "It may be considered, therefore, that the case is before this court rather on general principles."

There are two principal questions in the case, which are: *First.* That a partnership existed between plaintiff in error and defendant in error; and *Second.* That the set-off pleaded by defendant in error was barred by the statute of limitations at the time the answer containing it was filed. Both of these questions were presented to the jury by the instructions of the court, and as no complaint is made as

to them, it must be taken for granted that they stated the law correctly.

The testimony of the witnesses upon the subject of the terms of the contract was conflicting, defendant in error testifying that plaintiff in error said to him that he, plaintiff in error, had purchased forty acres of timbered land for \$530.00, and proposed that if defendant in error would oversee and attend to the cutting, hauling, and marketing the wood, that after all expenses were paid, including what he paid for the land, he would give defendant in error one-half of the balance, which defendant in error agreed to do. Plaintiff in error testified that he and defendant in error undertook the cutting of the wood off and marketing it, and divide whatever was made out of it.

The court instructed the jury, in substance, that if they found that plaintiff in error was the owner of the timber, and employed defendant in error to superintend the cutting, hauling, and marketing of the same, and agreed to pay him for his services in that behalf one-half of the proceeds of the wood which should remain after all the disbursements and expenses incurred in such cutting, hauling, and marketing were paid, such facts would not constitute a partnership between the parties.

Assuming that the facts as testified to by plaintiff in error would constitute a partnership, it must be conceded that the facts as testified to by defendant in error would not.

The question of fact, as to which of the witnesses was correct, was a question which it was the peculiar province of the jury to determine, and with their finding we must be content.

It appears that as the work was being done, and the wood sold, the parties would pay to each other certain sums of money as a part of the proceeds, but without much formality in the way of keeping books of account, and at the close there was some wood, posts, etc., left on

hand. It was testified by defendant in error that in the spring of 1880, and within four years prior to the filing of the answer, plaintiff in error sold some of the wood, and paid defendant in error one-half of the proceeds. This is not denied by plaintiff in error, but he testified that it was likely true that there were some "little odds and ends around" owing to them for wood, and that as it was collected he would pay to defendant in error. If there was no partnership, and if, as testified by defendant in error, there was a large amount of money due him for his services in handling and disposing of the wood, then it is clear that the statute of limitations did not commence to run until his services were rendered, and the wood disposed of. This being true, the jury were justified in finding the set-off not to be barred by the statute. Many cases occur where the verdict of a jury on questions of fact are not entirely satisfactory to the court, and this seems to be such an one, but the courts must not invade nor intrude upon the domain of juries as triers of facts submitted to them, unless the verdict is clearly and manifestly wrong. Such being the law, the verdict must stand.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

J. H. McMURTRY, PLAINTIFF IN ERROR, V. J. T. MADISON, DEFENDANT IN ERROR.

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58 294

1. **Sale of Real Estate: COMMISSION TO AGENT.** In an action to recover for the value of services as agent in selling real estate, and there is testimony tending to show that the plaintiff rendered some service, but did not effect a sale, an instruction that if the jury believe that he rendered some service he is entitled to recover on a *quantum meruit* is not improper.
2. ———: ———. Where there was evidence tending to show that the plaintiff rendered no services whatever in effecting a sale of real estate, an instruction to the effect that if the jury should so find the plaintiff would not be entitled to recover is based upon evidence in the case, and is not inconsistent with the first instruction.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

J. A. Marshall, for plaintiff in error.

Snelling & Talbot, for defendant in error.

MAXWELL, J.

This is an action brought by the plaintiff against the defendant to recover certain commissions for the alleged sale of 207 acres of land near Lincoln, in the spring of 1883. The answer of the defendant admits that he was the owner of the land in question at the time stated, and admits the employment of the plaintiff, but denies all the other facts stated in the petition. On the trial of the cause in the court below the jury returned a verdict for \$10.00 in favor of the plaintiff, upon which judgment was rendered. From this judgment the cause comes to this court on the plaintiff's behalf upon a petition in error.

The testimony tends to show that in February, 1883,

the defendant being the owner of 207 acres of land a few miles from Lincoln, authorized the plaintiff to sell the same for \$6,000, but at the same time reserved the right to sell the land himself if an opportunity offered. That about the 1st of March, 1883, the defendant being at the coal office of Hutchins & Hyatt, in Lincoln, informed one McRoberts, an employe of Hutchins & Co., that he desired to rent or sell his land, and promised to compensate him if he would find a purchaser. A few days after this conversation McRoberts and a Mr. Parker, the father-in-law of Mr. Hutchins, drove out to the farm of the defendant, and there seems to have been some conversation about renting the farm, but the defendant stated that he did not want to rent it, but preferred to sell. These persons informed Mr. Hutchins that the land was for sale, and seem to have induced him to examine the farm with a view to purchasing the same. When Hutchins was ready to drive out to the defendant's farm he called at the plaintiff's office and inquired for land for sale in the direction in which he was going. The plaintiff informed him that the defendant's land was for sale, also a farm near Raymond, and perhaps other lands. Hutchins, after several visits to the farm, completed the purchase with the defendant for the sum of \$5,500. There is some testimony of not a very satisfactory character that the plaintiff was the means of inducing the defendant to abate the price asked for the land somewhat, and of persuading Hutchins to pay a greater price than he at first offered, thereby effecting a sale. But this is denied. The testimony of Mr. Hutchins upon that point is as follows:

Q. What did McMurtry do on that occasion? Did he simply give you the numbers of the farms around there?

A. Yes, I think probably he gave me the numbers. I remember that he gave me the numbers of the lands.

COURT. Did he give you the price on this Madison county farm?

McMurtry v. Madison.

A. Yes, with other farms also. Yes.

Q. Do you remember what the price was that he gave you?

A. He told me it could be bought for twenty-five dollars an acre.

Q. Did you consummate the trade this time that you went up there, or subsequently?

A. After.

Q. You did not trade with him at that time?

A. No, sir.

Q. After you had looked at the farm and it suited you, then you began to negotiate with Madison for the sale of it?

A. Yes.

Q. When did you finally complete this sale, do you remember?

A. Along in March some time.

Q. Was that all that McMurtry did, simply gave you the numbers of this land and the price, when you went over to ask him about other lands?

A. That is all that I recollect of. I do not remember all of the conversation. I did not stop but a moment.

On cross examination, in answer to a question in regard to a telephone message to the plaintiff, he stated: "I asked him if I was right in the price he gave me on that place." That was my object in telephoning him.

The testimony clearly shows that the plaintiff did not procure the purchaser, and that he did not effect a sale. The most that can be claimed is, that he acted as intermediary in carrying propositions from one to the other. The plaintiff, therefore, in no event, would be entitled to full commissions for the sale.

It is claimed that the court confused the jury by the following instructions, which it is claimed are inconsistent:

"*Second.* If you shall find that defendant employed plaintiff to assist in the sale of defendant's farm, and plain-

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McMurtry v. Madison.

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McMurtry v. Madison.

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It is claimed that the court confused the jury by the following instructions, which it is claimed are inconsistent:

"*Second.* If you shall find that defendant employed plaintiff to assist in the sale of defendant's farm, and plain-

tiff did assist in the sale, even though plaintiff did not wholly procure the purchaser, still, if plaintiff, at request of defendant, assisted in procuring the sale, he is entitled to what his services are reasonably worth, and your verdict must be in favor of the plaintiff."

This is conceded by the plaintiff to be correct if the jury should find that the plaintiff was entitled to recover on a *quantum meruit*. And under the evidence he is entitled to recover, if at all, only for the actual services rendered by him. It is alleged that the next instruction given is wholly inconsistent with the above. It is as follows: "The jury are instructed that if you believe from the evidence that the defendant employed the plaintiff to sell his farm and to procure a purchaser thereof, and if you further believe from the evidence that the purchaser, Hutchins, received his information which led to the purchase of said farm from other parties than the plaintiff, and that plaintiff did not procure the purchaser of said farm and the sale thereof, than plaintiff cannot recover and you will find for defendant." The defendant in his evidence denies that the plaintiff performed any services for him whatever in selling the farm, and in this he is corroborated to some extent by the testimony of other witnesses. If the jury believed this evidence and not that on the part of the plaintiff, then the plaintiff would not be entitled to recover. The instruction, therefore, was proper and the plaintiff has no cause of complaint. It is apparent that substantial justice has been done and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SAMUEL McCLAY, PLAINTIFF IN ERROR, V. CHARLES
H. FOXWORTHY, DEFENDANT IN ERROR.

1. **Administration of Estates: SALE BY ADMINISTRATOR BOND.** An administrator who has not previously given a sufficient bond, upon obtaining a license for the sale of real estate must execute a bond to the judge of the district court, with sufficient sureties, to account for all the proceeds of the sale etc.
2. ———: ———: **PRACTICE.** When such bond was not given before the sale, *Held*, That the administrator be required to execute a bond with sufficient sureties in double the amount of money to be derived from the sale, within twenty days, or in case of default that the sale be set aside.
3. ———: ———: **GUARDIAN AD LITEM NOT NECESSARY.** The failure to appoint a guardian *ad litem* for minor heirs of an estate will not affect the validity of a sale of real estate by an administrator for the payment of debts of the estate.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

Charles L. Hall, for plaintiff in error.

Foxworthy & Son, for defendant in error.

MAXWELL, J.

In February, 1885, the defendant in error filed a petition in the district court of Lancaster county, wherein he alleged that on the 6th day of September, 1884, he was duly appointed administrator of the estate of Warren B. Dunlap deceased, in Lancaster county, in this state, and that he is now duly and legally qualified as such administrator; that on the 8th day of April, 1888, Warren B. Dunlap died intestate in Lancaster county, in this state, "leaving surviving him as heirs of his estate, Mary E. Dunlap, his widow and three children, as follows: Mabel Dunlap, aged 1

years; Iris Dunlap, aged 4 years; and Maudé Dunlap, aged 1 year;" that the "deceased died seized in fee of the following real estate, to-wit: The north half of the southeast quarter of section five (5), township nine (9), range seven (7) east, containing eighty acres, in Lancaster county, Nebraska, and of the value of about \$3,000, and also a house and lot in Adams county, Illinois, of the value of about \$400; also two notes and a mortgage in Adams county, Illinois, worth \$500, and personal property of the value of about \$459.10, making the total value of the real and personal estate at the time of his death, about the sum of \$4,359.10;" that "said deceased at the time of his death was indebted as follows: To E. T. Hartley, as deferred payment on the eighty acres of land herein described, \$1,700, \$600 of which was due March 27th, 1884, and \$1,100, which will be due March 27th, 1885; also other debts in the aggregate about the sum of \$966." There are other allegations as to the insufficiency of the personal assets to pay the debts, and the necessity for selling the land in question, which need not be noticed. The judge of the district court made an order that Mary B. Dunlap, the widow, and Mabel Dunlap, Iris Dunlap, Maude Dunlap, and all other persons interested in said estate, appear before him at a time and place stated, and show cause why a license to sell said real estate should not be issued. This order was duly published and proof of the publication filed, and at the time set for the hearing a license was duly issued under which the defendant in error sold the land to the plaintiff for the sum of \$3,200, the amount due on the incumbrance being the sum of \$1,861.50. The plaintiff thereupon filed objections to the confirmation of the sale, as follows:

"*First.* That the administrator has not given the bond to the judge of this court required to be given by section 75, chapter 23, entitled 'Decedents,' etc.

"*Second.* That no guardian *ad litem* has been appointed

in this case for the minor heirs of Walter B. Dunlap, deceased," etc.

The objections were overruled, and the sale confirmed.

Sec. 75 of the statute relating to decedents is as follows: "When the executor or administrator is authorized to sell more than is necessary for the payment of debts, he shall, before the sale, give bond to the judge of the district court, with sufficient sureties, to account for all the proceeds of the sale that shall remain after the payment of the debts and charges, and to dispose of the same according to law; and in all cases where license is granted for the sale of real estate the judge of the district court may require a further bond from the executor or administrator, when he shall deem it necessary." Comp. Stat., Ch. 23.

Sec. 119 provides that, "In case of any action relating to any estate sold by an executor, administrator, or guardian, in which an heir, or person claiming under him, shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear—*First*. That the executor, administrator, or guardian was licensed to make the sale by the district court having jurisdiction; *Second*. That he gave a bond, which was approved by the judge of the district court, in case a bond was required upon granting license; *Third*. That he took the oath prescribed in this subdivision; *Fourth*. That he gave the notice of the time and place of the sale, as in this subdivision prescribed; and *Fifth*. That the premises were sold accordingly, and the sale confirmed by the court, and that they were held by one who purchased them in good faith."

The testimony tends to show that the widow and minor heirs are residents of Illinois; that an administrator was appointed in that state; that the sum of \$800 of the personal property was awarded to the widow, presumably under the statute of Illinois, but that fact is not made to appear. It is proved, however, that \$800 was set apart for

her use, and that the remainder is entirely inadequate to pay the debts and costs of administration. This being the case, the necessity for a sale of the land in question is clearly established. The record, however, fails to show that Foxworthy has given a bond as administrator of said estate. It is admitted by implication that he has not. The bond of the administrator in Illinois is no security for the funds that may come into the hands of Foxworthy by virtue of this sale. Courts and judges should in all cases require adequate security for the funds derived from a sale of the property of a decedent, in order that such funds may be properly accounted for; and no license for the sale of real estate should be issued except upon condition that abundant security be given. The court therefore erred in not requiring Foxworthy to give a bond with sufficient sureties conditioned as required by statute.

Second. The failure to appoint a guardian *ad litem* for the minor heirs of said estate is not available as an objection. A proceeding under the statute to sell real estate of the deceased for the payment of debts against the estate is not, strictly speaking, an action. It is purely a proceeding *in rem*, where the principal questions involved are, the amount of debts outstanding against the estate, the amount of personal property available for the payment of the debts, and the necessity to sell the land for which license is sought for the payment of the same. The proceeding is not adversary in its character in the sense in which the term is used in an action, as only so much of the estate descends to the heirs as exists after the payment of the debts. The notice is to be given to the heirs and all persons interested in the estate. If the reasons assigned by the petitioner to obtain a license are unfounded, or insufficient, or untrue, it is presumed that some one interested in the estate will make these facts appear, or that the judge will refuse to grant the necessary authority. No guardian *ad litem*, however, is necessary.

Sapp v. Roberts.

In this case the land in question seems to have been sold for its full value, and the purchaser is entitled to protection. The defendant has leave within twenty days to file a bond in double the amount of money that will come into his hands, with sureties to be approved by the judge of the district court, and conditioned as required by law to account for the funds derived from said sale; and upon condition that such bond is given and approved within the time stated the sale is confirmed; otherwise the order confirming the sale will be reversed and the sale set aside.

JUDGMENT ACCORDINGLY.

THE other judges concur.

GEORGE W. SAPP, APPELLEE, v. MOSES ROBERTS, APPELLANT.

1. **Injunction.** Equity will interfere by injunction to prevent the destruction of an osage hedge fence by a stranger to the inheritance, as being such an injury to the realty as cannot be fully compensated by damages for the trespass.
2. **Trial.** Questions of fact and upon conflicting testimony are for the trial court to decide, and its decision will not be molested by the appellate court, unless clearly wrong.

APPEAL from the district court of Johnson county,
Heard below before BROADY, J.

T. Appleget & Son, for appellant.

Injunction will not be granted where the parties are in dispute concerning their legal rights until the right is established at law. *Mammouth, etc., Appeal*, 54 Pa. St., 183. *Minnig's Appeal*, 82 Pa. St., 373. *Corning v. Troy, etc.*,

40 N. Y., 191-207. The injury being completed, injunction will not lie. *Davis v. Londgreen*, 8 Neb., 47. *Coker v. Simpson*, 7 Cal., 340. And if the trespass be temporary or fugitive there is no ground for the granting of an injunction. *Minnig's Appeal*, 82 Penn. St., 373. *James v. Dixon*, 20 Mo., 79. *Hodgman v. Richards*, 45 N. H., 28. And where it does not appear that future waste is threatened the relief will be withheld. *Watson v. Hunter*, 5 Johns Ch., 169. And has not the plaintiff a statutory remedy for the injury complained of? See Comp. Statutes, page 48, §§ 11 and 17. If so, he is confined to the remedy provided by statute. *Hopkins v. Keller*, 16 Neb., 571.

Pinero & Chapman, for appellee.

Against the various authorities quoted by appellant, we interpose the case of *Grant v. Crow*, 47 Iowa, page 632, as laying down the present modern doctrine of injunction as a relief against trespassers. The appellant claiming to be a tenant in common in said hedge, gives the appellee the right to go into a court of equity to restrain appellant from committing waste. 2 American Dec., 625. 18 American Dec., 350. 1 Johns. Chan., 11. Civil Code, § 633. High Injunc., § 428. Freeman Co-tenantry, §§ 97, 323.

REESE, J.

An injunction was issued by the district court for the purpose of restraining defendant from cutting down a line of osage hedge fence between the farms of plaintiff and defendant. Upon final trial the district court found in favor of plaintiff generally, upon the facts, and rendered a decree making the injunction perpetual. Defendant appeals to this court.

The first question presented for decision is, whether or

not the plaintiff would be entitled to an injunction in the absence of proof of the insolvency of defendant, were it conceded that plaintiff was the owner of the hedge and that defendant was destroying it, there being a remedy for the damages.

We consider the rule well established as stated in *Tigard v. Moffitt*, 13 Neb., 565, that a court of equity will not interfere to prevent a mere trespass unless in cases where the plaintiff cannot obtain adequate relief at law. This rule being conceded, it remains to enquire whether or not an adequate remedy at law does exist for an injury of the kind spoken of.

Without entering into a discussion of the authorities at length, we will dispose of this question by saying that it now appears to be well settled that where the trees or shrubbery standing and growing on real estate are either fruit or ornamental trees, or shrubbery, injunction may be resorted to for the purpose of restraining their destruction. As said in *High on Injunctions*, second edition, § 724: Where "the trespass consists in the cutting of timber upon complainant's lands, going to the destruction of that which is essential to the value of the estate, and to the destruction of the estate itself in the character in which it has been enjoyed, a fitting case is presented for relief by injunction." See also *Fulton v. Harman*, 44 Md., 251.

A distinction seems to be clearly marked between what is known as waste by the destruction of timber which is valuable only as it is prepared for sale or use as lumber, wood, etc., and what is known as equitable waste or the destruction of such growth as was valuable only when standing and growing upon the land, such as ornamental trees and shrubbery, hedges, screens, young timber, and the like. 3d *Wait's Actions and Defenses*, 697, and cases there cited. An osage hedge fence is without value except as it is standing and answering the use for which it was intended. Its destruction would be of manifest injury

to the inheritance. 2d Story's Eq. Jur., § 915. The destruction of such property as a prudent man would not destroy in the management of his own affairs. *Turner v. Wright*, 2 De G., F. and J., 234. It is clear that in cases of this kind there is no adequate remedy at law. All persons are entitled to protection in the use, integrity, and value of their property, and where courts of law cannot give such protection by reason of the inability of plaintiff to prove his damages, equity will interfere. 3 Wait's Act. and Def., 700 and 701, and cases cited.

Another, and what must have been a far more difficult question for the trial court, is the question of fact involved in this case, both as to the ownership of, or rather the right of dominion over, the property and as to whether or not there was any actual injury to the hedge, it being claimed by defendant that the cutting was necessary for the development of the hedge as a fence. Upon these questions there was a marked and sharp conflict of testimony. But these questions of fact were decided by the trial court, and with that decision supported as it is by quite an amount of testimony which is unimpeached, save by the contradicting testimony of defendant and his witnesses, we must be content.

The decree of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, v. THE CHICAGO LUMBER COMPANY, DEFENDANT IN ERROR.

18	808
22	756
18	308
59	671

1. **Garnishment after Judgment.** In proceedings in garnishment after judgment, under section 249 of the Civil Code, if it is found that the garnishee is indebted to the execution defendant, the order of the court should be that the garnishee pay the amount found due. If the order is not complied with, it may be enforced by execution, as in cases where an ordinary judgment is rendered.
2. ———: **PRACTICE: GARNISHEE ESTOPPED.** When a garnishee, prior to the time when it is required to answer as to its indebtedness, files an answer as in an ordinary action, and issue being joined thereon a trial is had and other witnesses are examined, without objection to the course pursued, such garnishee will not be permitted to question the regularity of the proceedings in the appellate court.

REHEARING of case reported in 15 Neb., 392.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error.

John C. Watson, for defendant in error.

REESE, J.

A rehearing having been granted in this case, it has been re-submitted upon arguments and briefs of counsel. In the opinion, 15 Neb., 392, it is said: "Judgment was rendered against plaintiff in error and in favor of defendant in error for the sum of \$144.51." Attention having been called to this language—as well as other statements of substantially the same import—and it being apparent that the use of the language, although through inadvertence, might produce in the minds of some a wrong impression as to the holding of this court upon the question of the authority of the district court to render a general judgment

in proceedings in garnishment after judgment, a rehearing was ordered.

The record of the proceedings in the district court shows that no judgment was in fact entered, but that the garnishee, railroad company, was ordered to "pay over to said plaintiff herein, the Chicago Lumber Company, said sum of \$144.51, and upon failing to do so execution issue therefor."

This is in accordance with the provisions of the statute. Section 249 of the Civil Code provides that, "In cases where the garnishee in answering such interrogatories shall disclose that he is indebted to the defendant in execution, the court shall order the garnishee to pay over the amount found to be due from the said garnishee to the defendant in execution, which amount shall be collected by execution, as in other cases, as near as may be; and such amount, when paid or collected, shall be credited on the original judgment, and the garnishee shall be credited for the amount so paid or collected." As the proceedings in this case were instituted and carried through under the provisions of section 244, *et seq.*, of the Civil Code, and including the section above quoted, and not under section 221 as claimed by plaintiff in error, it will be seen that upon a finding against the garnishee the order may be enforced by execution in the same manner as judgments are enforced. As stated in *Hollingsworth v. Fitzgerald*, 16 Neb., 495, the order of the court is given all the force and effect of a judgment. But, as in this case, it must be an order and not a judgment. To this extent the original opinion in this case should be corrected.

Plaintiff in error seeks to object to the proceedings in the district court as improper and irregular, and claims that the answers of the garnishee through its agent "were full and complete to the effect that the company was not indebted to Babbitt," and "if those answers were not satisfactory, an action might have been brought against the

company, in which action the legality of the company's charges for freight and demurrage could have been investigated."

This question cannot properly arise in this case, for the reason that the full issue was tendered by plaintiff in error by an answer, in the usual form of answers filed in civil actions, before the answers of the agent were taken under the garnishee process. By the filing of this answer, irregular though it may have been, plaintiff in error virtually tendered to defendant in error an issue upon all the allegations of fact contained therein. To this answer defendant in error filed a reply, denying each and every allegation contained therein. Upon the issue thus joined a trial was had.

While these proceedings may have been unusual, yet no objection seems to have been made by plaintiff in error. Indeed, it seems to have first suggested this course by presenting its answer.

It is now claimed that no question was made upon the correctness of the charges made by plaintiff in error, and that nothing should have been considered by this court outside of the questions presented by the record, viz., "Whether the garnishee is indebted to the defendant in the garnishment proceedings." By reference to the answer we find that plaintiff in error alleged the following facts:

First. That it was in no way indebted to the judgment debtor, and had no property in its hands belonging to him.

Second. That it had in its possession 154 tons of coal worth \$4.00 per ton, shipped to the judgment debtor, amounting to \$616.00; subject to freight and back charges, \$666.63; demurrage on cars held by order of sheriff 675 days, \$830.00; unloading eleven cars of coal, \$33.00, making a total of \$1,029.63 charges against the coal. These allegations being denied, the issue was tried to the court, and a finding made upon each item. The parties having elected to try the cause as in an ordinary

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action, we do not see how they can now object to the proceedings adopted. While it is true, as claimed by plaintiff in error, that nothing could properly be considered beyond the simple question whether the garnishee was indebted to defendant in execution, yet it is equally true that all the questions discussed in the former opinion were presented upon the trial, and the district court, by reason of the issues formed, was required to pass upon the questions of fact thus presented, and those issues and findings were brought into this court by the record for review. According to the theory of plaintiff in error, as shown by its answer, all these questions were proper to be taken into consideration in arriving at a conclusion as to whether the garnishee was indebted to the execution defendant.

The other questions presented by the brief were considered in the former opinion, and as we are unable to see that we were in error then, they need not be further discussed now.

The decision of the district court will stand affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

TIMOTHY AUSTIN, APPELLANT, v. SABILLA F. AUSTIN,
APPELLEE.

1. Husband and Wife: CONVEYANCE: TRUST. Where an aged husband conveys certain property to his wife for the support of himself and family, and the trust was deliberately created, and is clearly established, it will not be set aside because of the disagreement and separation of the parties.
2. ———: ———: APPOINTMENT OF TRUSTEE. Where a hus-

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band conveys property to his wife for the support of himself and family, upon the disagreement and separation of the parties the court may, when it is deemed advisable to the due administration of the trust, appoint a new trustee.

APPEAL from the district court for Lancaster county.
Heard below before POUND, J.

Harwood, Ames & Kelly, for appellant.

Lamb, Ricketts & Wilson, for appellee.

MAXWELL, J.

The plaintiff brought this action in the district court of Lancaster county to recover certain real estate conveyed to the defendant, and for an accounting. On the trial of the cause the court found for the defendant and dismissed the action. The plaintiff appeals.

It appears from the record that the plaintiff and defendant were married in October, 1878, and thereafter cohabited together as husband and wife until March, 1883. That at the time of the marriage the plaintiff was about sixty-three years of age, and had several children by a former marriage, some of whom lived at Bennett, where the plaintiff and defendant resided. That at that time the plaintiff was possessed of a considerable amount of property, including B. & M. land contracts for land near the village of Bennett. The defendant, at the time of the marriage, was about four years younger than her husband, and had a number of children by a former marriage, some of whom resided at or near Bennett, and the youngest, a daughter, until the separation, resided with the plaintiff and defendant. The defendant was also possessed of considerable property, estimated by herself at \$6,000. It is pretty evident from the evidence that prior to his marriage with the defendant the plaintiff had given to each of his children a considerable amount of property. That

soon after the marriage one of the children obtained from him an assignment of the B. & M. land contracts, and perhaps of other things of value. That about that time, as the defendant alleges, and apparently with cause, the plaintiff placed all his remaining property in her hands to prevent his children from getting it. At the time of the transfer the defendant made a will, in which it was provided, in case of her death, the plaintiff should have a suitable maintenance out of her estate during his life-time. This will does not seem to have been satisfactory to some of the children, and was afterwards destroyed. A second will was made, to which it is unnecessary to refer. Some time during the month of March, 1883, the plaintiff ceased to live with the defendant, and assigns a number of reasons for his conduct which need not be here referred to. Probably but for the interference of his children the alleged causes for disturbance, if they really existed, would have been overcome. Be that as it may, the parties separated, and this action was brought to recover the property conveyed by the plaintiff to the defendant for his support. The defendant frankly admits in the answer that certain property named therein was transferred to her for the use and support of her husband and family. It would subserve no good purpose to review the evidence at length. Both the plaintiff and defendant, evidently, are worthy persons, and had they resided at a place remote from their children in all probability no differences would have arisen between them. The property was deliberately conveyed and transferred by the plaintiff to the defendant for the use of himself and wife. A considerable portion of the real estate has been conveyed to innocent third parties, who should be protected in their purchases. The trust is clearly established, and having been deliberately created by the plaintiff we see no sufficient reason for setting it aside.

A court of equity, however, when necessary to fully carry

out the trust, when the trustee has become incapable from any cause from performing the trust duties, will remove a trustee and appoint another. This power rests in the sound discretion of the court, to be exercised in such manner as to promote the due administration of the trust. *People v. Norton*, 9 N. Y., 176. *In re Cohn*, 78 Id., 248. *Preston v. Wilcox*, 38 Mich., 578. *In re Bernstein*, 3 Redf., 20. *North Car. R. R. v. Wilson*, 81 N. C., 223, *McPherson v. Cox*, 6 Otto, 404. *Satterfield v. John*, 53 Ala. 127. *Farmers Loan, etc., Co. v. Hughes*, 18 N. Y. Sup. Ct., 130. *Bloomer's Appeal*, 83 Pa. St., 45. *Sparhawk v. Sparhawk*, 114 Mass., 316. *Ketchum v. Mobile, etc., R. R.*, 2 Woods, 532. *Scott v. Rand*, 118 Mass., 215. *In re Adams' Trust*, L. R., 12 Ch. D., 634. *Ex parte Hopkins*, Id., 9 Ch., 506. *Wilkinson v. Parry*, 4 Russ., 272, 276. *Coventry v. Coventry*, 1 Keen, 758. *Greenwood v. Wakeford*, 1 Beav., 576, 581. *Forshaw v. Higginson*, 20 Id., 485. *In re Stokes' Trusts*, L. R., 13 Eq., 333. *Chalmer v. Bradley*, 1 J. & W., 51, 68. *Cruger v. Halliday*, 11 Paige, 314. *Shepherd v. McEvers*, 4 Johns. Ch., 136. *Dieffendorf v. Spraker*, 10 N. Y., 246. *Forster v. Davies*, 4 De G., F. & J., 133. *In re Blanchard*, 3 Id., 131. *Paliaret v. Carew*, 32 Beav., 564, 567. *Crombes v. Brookes*, L. R., 12 Eq., 61. *In re Roche*, 2 Dr. & War., 287. *In re Watt's Settlem.*, 9 Hare, 106. *Mennard v. Welford*, 1 Sm. & Gif., 426. *In re Bignold's Trusts*, L. R., 7 Ch., 223. *Withington v. Withington*, 16 Sim., 104. *Pomeroy Eq.*, § 1086. The parties have leave to agree, upon a suitable trustee. Failing to do so the court will appoint. The trustee thus appointed will give security to be approved by the clerk of this court in the sum of \$4,394, and within ninety days from the entry of the decree the defendant is required to pay to said trustee the sum of \$2,172, which she admits having received, which sum, subject to the defendant's rights therein, will be expended as may be necessary for the support of the plaintiff, and if

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need be the defendant. The judgment of the district court is reversed, and judgment will be entered in this court in conformity to this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SAME V. SAME.

Husband and Wife: CONVEYANCE TO WIFE. Where a husband in advanced years conveys property to his wife for the purpose of having it held in trust for him, and the wife, contrary to the intention of the husband, and in violation of the trust, conveys it to third parties, and with the proceeds thereof or with the money or property of the husband purchases other property and receives the title in her own name, upon their separation equity may require an accounting, and make such decree as to the property owned at the time of the decree as will protect the interests of both the husband and wife.

REHEARING of foregoing case.

Harwood, Ames & Kelly, for appellant.

Lamb, Ricketts & Wilson, for appellee.

REESE, J.

On motion of appellee a rehearing was granted and the case has been re-submitted upon able printed briefs and arguments filed by the respective parties.

There appear to be two material questions in the case, and to the discussion of which counsel have principally devoted their attention: *First*. Was the conveyance of the property of plaintiff to defendant in trust for any purpose? and, *Second*. If so, what decree should be entered for the proper protection of the rights of the parties?

It is claimed by defendant that the conveyance to her was a full and absolute conveyance of the title in fee, and that she holds it free from any rights or claims of plaintiff. That it was a voluntary conveyance and transfer, from the effects of which plaintiff cannot now escape.

We think this is clearly at variance with the intention of both parties, and wholly inconsistent with the purposes for which the transfer was made and received. Taking the testimony of defendant alone it is shown that soon after their marriage plaintiff, through some cause or other, which is immaterial here, concluded that his children were seeking to circumvent him and procure all his property. He made known this fact to defendant, and declared his purpose of putting it into the hands of some one from whom they could not get it. She says his plea was, "They had his money, and were bound he should not get it, and he seemed much hurt; says he, 'I am going to put the property in somebody's hands where the children cannot get it; the children have got all, or nearly all.' He proposed first to put it in my crippled daughter's hands. I objected very positively. Said he, 'I will put it into yours instead.' I said 'I am step-mother and don't want it.'" This is a sufficient quotation to show that there was no purpose to convey, and no expectation of receiving an indefeasible title. If this is the true version of the case, plaintiff was fearful he would lose his property, and for the purpose of *saving* it desired the title to be held by another. It was not prompted by love and affection for the wife, for his first impulse was to convey it to another, and had it not been for the positive objection referred to he, perhaps, would have done so. It could not have been intended as an advancement to the wife, for, as we have seen, he proposed conveying it to her daughter; besides, it is shown that at the time of the marriage it was agreed that each should retain their property.

It is true plaintiff testifies to a different state of facts,

and if he is correct it was defendant who became alarmed lest the children of plaintiff should get his property. For the purposes of the question now under consideration it is wholly immaterial as to which is the correct theory of the case. Either one establishes the theory of plaintiff as to the purpose with which the conveyances were made. Plaintiff was old, hard of hearing, and evidently, to some extent at least, in his dotage. Defendant, though only four years younger, was in the enjoyment of all her faculties, and evidently much his superior in that respect. That she understood the purpose for which the conveyance was made to her cannot be questioned.

The second question involved in the case is one of some uncertainty. It is apparent that the property of defendant has not been impaired and but little of her funds were exhausted while they cohabited together. It is also apparent that plaintiff has but little if any property left. As stated in the former opinion, the purchasers of the real estate who have in good faith invested their money cannot be disturbed. And, as claimed by defendant, it would be unjust to require her to account for all the money and property placed in her hands by plaintiff, since she has contributed, in part at least, out of those funds toward the maintenance of plaintiff and defendant. While it would seem to the writer to be going beyond the proper bounds of the court to render a decree requiring the payment of a certain sum of money, or in the event of her failure to sell her property upon execution for that purpose, and thus strip her in part of the necessary means of support, yet we think the trust fund can be followed into the real estate now owned by her and purchased therewith. It is insisted that the family expenses were paid out of the money and proceeds of property placed in the hands of defendant, and that it has thus been more than exhausted. This proposition should be given such weight as it is entitled to, but it can hardly be said that during the five years of

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the married life of the parties their estates would so materially change in relative values by the proper use of the property of plaintiff in maintaining the husband and wife. The real estate owned by plaintiff and conveyed to defendant has been conveyed away by her, and other real estate purchased which appears to be of considerable value. It should not be required of defendant that she return to plaintiff all the property and money received, but common fairness and the principles of equity require that some return of this trust property be made. The testimony shows that lot No. four in block nine and the east half of block ten in Roggencamp's addition to Bennett are held by defendant, the title being in her name, but procured, in part at least, by the labor and money of plaintiff, and that there are three dwelling-houses thereon, but we are unable to determine the value of the several lots or to ascertain from the record upon which lots the buildings are located. If the parties can agree by stipulation as to the value of each lot with the improvements thereon, such decree will then be entered as will protect the rights of the parties, otherwise a reference will be ordered for the purpose of ascertaining the values.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN B. HOLMES, PLAINTIFF IN ERROR, V. ROBERT
IRWIN, DEFENDANT IN ERROR.

Damages by Stock: NEGLIGENCE OF OWNER. Where A purchased of B an enclosed pasture, paying therefor an extra price, the consideration for such extra price being that A might turn his stock into such pasture and thereby avoid the expense and trouble of having to herd his stock, which was fully understood

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by B, and where the stock were turned into the field and continued to run there until the pasturage was eaten up, B residing upon the premises and in a position where he could know of any damage being done by the stock, and where he had cribbed his corn on the premises and within the inclosure in which the stock were permitted to run, but A had no knowledge of the existence of the crib of corn, and where A's stock, without his knowledge, ate and destroyed the corn, *Held*, That A would not be liable for such damage and that there was no question of negligence on his part to submit to a trial jury.

ERROR to the district court for Cass county. Tried below before POUND, J.

Beeson & Sullivan, for plaintiff in error.

S. P. Vanatta, for defendant in error.

REESE, J.

One of the causes of action as stated in the petition of defendant in error—who was plaintiff in the district court—was, that in the year 1883 the cattle and stock of plaintiff in error broke into a house or crib where defendant in error had his corn stored, and ate up and destroyed one hundred bushels of the corn of the value of thirty-five dollars. To this part of the petition plaintiff in error answered that during the year 1883 he rented a stock field of defendant in error for pasture for his cattle. That by the terms of the contract the cattle of plaintiff in error were to run in the field, that he was not to herd them, but defendant in error was to take care of them. That the house in which the corn of defendant in error was stored was in the same inclosure, and whatever damage the cattle did to the corn was by reason of the carelessness of defendant in error in not keeping the cattle away from the cribs, and not by the fault or carelessness of plaintiff in error. A reply was filed by defendant in error denying the allegations of the answer.

There was but little conflict in the testimony upon the

material facts of the case, and they may be fairly stated as follows: In the fall of the year 1882, defendant in error had a field of stalks, from which the corn had been gathered. The field was enclosed. The house in which the corn was cribbed was within the field, but plaintiff had no knowledge of the corn being in it. He purchased the pasture of defendant in error, paying therefor fifty cents per acre. The price paid was more than was usually paid for such pasture, but he made the purchase because the field was fenced and he would not have to herd the cattle. This latter fact was the cause of the purchase. It was so understood by both, as testified to by defendant in error. It was mutually understood that plaintiff in error was to turn his cattle in the field, and they were to be unrestrained therein, except as defendant in error should keep them from about his dwelling house. The house in which the corn was stored was about eighty rods from the dwelling of defendant in error, but not in sight. Of evenings defendant in error would drive the cattle toward the house of plaintiff in error, which was upon adjoining land, and plaintiff in error would put them up until the next morning. Plaintiff in error had no knowledge that any damage was being done by the cattle during the time they were in the field, nor for some months thereafter. The house which contained the corn was in the corn stalks and had no fence around it. The building was an old one, and the cattle broke off the boards and ate and damaged the corn. The court instructed the jury orally as follows:

"If you find from the evidence that the defendant bought of the plaintiff corn stalks in a certain field, for the purpose of driving his stock into the field and feeding the stalks, and the plaintiff knew that fact, knew that was the purpose for which the stalks had been bought; and if you further find that defendant did turn his stock into the corn field, and while there they broke into the building or house in which the plaintiff had corn, and did damage to the corn,

then you will further inquire through the fault and negligence of which party this damage was done. If the plaintiff had the corn in this building or house, and had properly protected it, properly boarded up the doors and windows of the building in which the corn was housed, and through the fault or negligence of the defendant in not properly looking after his stock and they did damage to this corn he would be liable for it. The degree of care and diligence which the defendant ought to exercise would be measured somewhat by the knowledge of what he knew or ought to have known by the exercise of proper care as to what was in the field, and as to what his stock were doing; and you should inquire, finding out, ascertaining what he did know, or might, or ought to have known, by the exercise of proper diligence. Of course you should inquire as to his means and opportunity of knowing where his stock was, what they were doing, and what was in the field in which he turned the stock; finding out how near he lived to it, and his opportunities for seeing and knowing. I hardly think he would be liable unless he was guilty of some fault or negligence. To ascertain whether he was or not, it is right to consider all the circumstances as they appeared. If you find they did damage, and the defendant is liable for the corn, you must be governed by the amount as to the corn actually damaged, and as to the extent of the damage. Of course he must only be liable for the actual damage done, if for anything." To the giving of which plaintiff in error duly excepted. The trial resulted in a judgment in favor of defendant in error. Plaintiff in error alleges error in giving the foregoing instruction and brings the cause into this court for review by proceedings in error.

As the judgment was for a very small amount (\$1 exclusive of costs) we are loth to disturb it, and thus remand the cause for a large increase of the costs, which are already somewhat heavy. But as we view the foregoing instruction the judgment cannot be rightfully sustained. The in-

struction above quoted is not only quite ambiguous, but it in some respects misstates the law and must have misled the jury. The suggestion by the court that he "hardly" thought plaintiff in error would be liable unless he was guilty of some fault or negligence, would not be sufficient under the proofs upon that question. If there was any question of negligence to submit to the jury they should have been instructed that plaintiff in error would not be liable, unless he was guilty of negligence. The cattle were rightfully in the field. How could it be possible for plaintiff in error to be liable without negligence on his part? But we think there was no question of negligence to submit to the jury. Plaintiff in error was not expected to look after his cattle. It was the very thing he had paid an extra price to avoid. It was the mutual agreement of the parties that he should not be required to "look after his stock" or to know "what his stock were doing." He was under no obligations to know "where his stock were, what they were doing, and what was in the field in which he turned the stock." He had paid an extra price to be relieved of that duty. The cattle were not trespassers, they were lawfully there. To be guilty of negligence is to fail to discharge a duty. What duty did plaintiff in error owe to defendant in error in the way of finding out or ascertaining "as to what was in the field?" Clearly none. We know of no law which would inject into a contract and force upon the parties to it an element as between them which they contracted it should not contain. Plaintiff in error had no knowledge of the existence of the corn. Defendant in error had; he had put it there, yet he failed to give any notice either of its existence or of the damage done until months after the cattle were removed from the field.

It is apparent that the learned judge who presided in the trial court, annoyed, perhaps, and impatient over being compelled to devote valuable time to a suit involving so small an amount, was not as careful in the use of language

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in giving the instruction as is usual for him, and through inadvertence gave the instruction. But, as we view it, it should not have been given, and in doing so there was error. For that reason the judgment must be reversed.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

18	318
46	190
18	318
51	664
54	290
55	712

**JOHN S. AND E. MARY GREGORY, APPELLANTS, AND
J. H. MCMURTRY, PLAINTIFF IN ERROR, V. REUBEN
R. TINGLEY, JOSEPH W. HARTLEY, AND S. M.
MELICK, SHERIFF, APPELLEES AND DEFENDANTS
IN ERROR.**

- 1. Amendment of Pleadings and Judgment.** Where real estate in an addition to a city was described as lots 11 and 12 in block 10 of L's addition to Lincoln, the block not being platted, and a further description by metes and bounds, in which the property is not accurately described, it is not error for the court to permit the petition to be amended to contain a correct description of the property, and amend the decree accordingly.
- 2. Judicial Sale: PURCHASER MUST PAY PRICE BID.** A party by purchasing real estate at a judicial sale subjects himself to the jurisdiction of the court. *Phillips v. Dawley*, 1 Neb., 320. And the court in a proper case may compel him to complete his purchase by the payment of the money. *Lansdown v. Eldon*, 14 Vesey, 512. *Errs. of Brashear v. Cortlandt*, 2 Johns. Ch., 505.
- 3. ———: ———: JURISDICTION OF PURCHASER.** A purchaser had given his check on a particular bank, payable on the confirmation of the sale, and after the sale was confirmed stopped payment on the check and refused to receive the deed and pay the purchase price; thereupon a motion supported by affidavits was filed to require the purchaser to pay the money, and an order, after due notice, was entered thereon, requiring him to pay

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the money in thirty days; *Held*, Proper practice. The court may proceed summarily against the purchaser, and the officer is not required to bring an action, although he may do so.

APPEAL AND ERROR from district court of Lancaster county. Tried below before MITCHELL, J.

John S. Gregory, pro se, and J R. Webster, for McMurry.

Ryan Bros., for Tingley, and W. J. Lamb, for Hartley.

MAXWELL, J.

In November, 1882, a decree of foreclosure and sale was rendered in the district court of Lancaster county against lots 11 and 12 in block 10 in Lavender's addition to Lincoln, the plaintiffs and others having an interest in said lots being made parties. That part of Lavender's addition was not platted, and after the description by lots was a further description by boundaries in the decree, as follows: "Beginning at a point 300 feet east of the south-east corner of block (94) ninety-four in the city of Lincoln, and running thence east 100 feet, thence south 142 feet, thence west 100 feet, thence north 142 feet to the place of beginning." The decree was rendered on the 11th of November, 1882. On the 15th of that month, Tingley and Hartley, two of the lien holders, filed a motion to amend the petition by correcting the description above given by inserting the word "north" where the word "south" occurs, and the word "south" where the word "north" occurs, a correct description being set out. The motion was sustained, and on the 18th of that month an amended petition was filed, in which the description is correctly given. To this amended petition Gregory and wife filed a plea in abatement. The case was then appealed to this court, the opinion being reported in 15th Nebraska, 256. After the cause was remanded to the district court the decree was

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amended to conform to the petition. No objection seems to have been made to this modification of the decree, but a sale being about to take place under the decree the plaintiffs brought an action to enjoin the sale, the principal ground for relief being that the court had no authority to amend the decree, and therefore the sale was unauthorized. The court below found the issues in favor of the defendants and dismissed the action.

From the facts above stated it will be seen that there is no equity in the bill. Lots 11 and 12 in block 10 in Lavender's addition to Lincoln were the property upon which Kellogg had his lien, and the mistake in the additional description seems to have misled no one. It certainly was the right of the lien holders to have the description corrected to conform to the facts, so that there would be no impediment to a sale of the property for the highest price possible to be obtained; and a party who, like the plaintiffs, purchased with notice of the facts has no cause of complaint on that ground. The injunction, therefore, was properly dissolved.

Upon the dissolution of the injunction the real estate in question was sold under the decree. The plaintiffs filed objections to the confirmation of the sale which were overruled. These objections are substantially the same as those upon which the injunction was sought, and were properly overruled. Valid objections to the sale did exist, such as the failure to advertise said property at least thirty days before the day of sale. *Lawson v. Gibson*, ante p. 137. But they were not made in the court below and cannot be considered here. The objections, therefore, were properly overruled.

The real estate in controversy was sold under the order of sale to J. H. McMurtry for the sum of \$3,250. McMurtry gave the sheriff a check on the Capital National Bank of Lincoln, payable, as sworn to by the sheriff, on the confirmation of the sale. The attorney for McMurtry,

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however, files an affidavit that "the check was not payable until it should be determined that good title would be assured to him as the result of such sale." Upon the confirmation of the sale the sheriff deposited the check in the First National Bank of Lincoln, and afterwards paid Tingley and Hartley the amount due on their respective decrees out of the funds so received. Afterwards McMurtry stopped payment on the check. The attorneys for the sheriff thereupon filed a motion supported by affidavits to require McMurtry to pay the amount of said bid into court. Certain counter affidavits were filed, which need not be here considered. On the hearing of the motion the court made an order that said purchaser pay the sum of \$3,250 into court within thirty days. This order is now assigned for error.

The power of a court of equity to compel a purchaser to complete his purchase was frequently exercised under the former chancery practice. Thus in *executors of Brasher v. Cortlandt*, 2 Johns. Ch., 505, a tract of land was sold under a decree to one Clay for the sum of \$16,000, who paid \$50 as a deposit. The sale was confirmed and the master directed to make a deed to the purchaser and receive the purchase money. The master thereupon tendered a deed to the purchaser, who refused to pay the purchase price and receive the deed. An order was thereupon entered requiring him to complete his purchase by the payment of the purchase money with interest, or show cause by a day named why an attachment should not issue against him. The principal ground of defense was, that an appeal had been taken which would arrest all the proceedings. In delivering the opinion the chancellor said: "The purchaser ought in this case to be compelled to complete his purchase. Such an order was made in the case of *Lansdown v. Eldon*, 14 Vesey, 512, and several cases of the like kind in the court of exchequer were there referred to. The Lord Chancellor in that case ordered the purchaser to pay his purchase money within a fortnight or stand com-

mitted; and he observed that a purchaser could not be permitted to baffle the court. * * * I do not mean at present to lay down any general rule on the subject of coercing a purchaser by attachment; but I ought not to hesitate under the circumstances of the case; and I have no doubt the court in its discretion may do it in every case where the previous conditions of the sale have not given the purchaser an alternative. Here it has become necessary in order to give due effect to the authority and process of the court, and to preserve them from being treated with contempt."

In *Jackson v. Edwards*, 7 Paige, 387, it was held that the court will not give a purchaser at a master's sale the benefit of his purchase where he neglects to comply with the terms of sale in a reasonable time, if a resale is deemed more beneficial to the parties. These powers are retained under the code. A party by purchasing at a judicial sale subjects himself to the jurisdiction of the court. *Phillips v. Dawley*, 1 Neb., 320. And he may appear before the court at any time before the confirmation of the sale and ask to be discharged from the same, as where there is a fatal defect in the title or proceedings which cannot be cured by amendment, the court may discharge him and order return of the deposit or purchase money. *Owen v. Foulder*, 9 Ves., 348. *Morris v. Mowatt*, 2 Paige, 586. The objections, however, must be made before the confirmation of the sale. There may be special circumstances, as in *Fraser v. Ingham*, 4 Neb., 531, where a sale may be set aside after confirmation, but the question does not arise in this case, and need not be considered. The purchaser in this case knew substantially all the facts relating to the title of the property at the time of the sale. His check was drawn to be paid on the confirmation of the sale, thus giving him the use of the money until that time. This provision was in his favor, and upon the confirmation being made the officer was entitled to the amount of the check. The fact

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that a purchaser makes no objection to the sale, as in this case, until after it is confirmed, and then refuses to pay the purchase price because the officer will not guarantee a good title to the property, indicates bad faith on his part and an effort to impede the administration of the law. The court requires good faith on the part of bidders, and in a proper case will require the purchaser to complete his purchase by the payment of the money. This may be done by action, as all the remedies known to the law are open to the officer; but the summary remedy is by motion on notice to the purchaser, and that was the course pursued in this case.

The court will protect its officers as far as possible from loss or damage in the faithful performance of their duties; and as the officer in this case, after the confirmation of the sale, without objection and relying upon the purchaser's check, paid the amounts due to Tingley and Hartley, justice requires that he be protected. It is very clear that justice has been done, and the judgment of the court below is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**LOUIS METTE AND GEORGE KANNE, PLAINTIFFS IN
ERROR, V. DANIEL L. MCGUCKIN, DEFENDANT IN
ERROR.**

Constitutional Law: LIQUOR LAW CONSTITUTIONAL. The act of the legislature approved February 28, 1881, commonly known as the Slocumb Liquor Law, is not unconstitutional as being in violation of the provisions of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens

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in the several states," it being the exercise of the police power of the state for the protection of its citizens, and not for the purpose of revenue or the regulation of commerce. In the exercise of such power, it is competent for the legislature to require that the licensee shall be a resident of the state, and subject to its laws and to the processes of its courts.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Warren Switzler, for plaintiffs in error.

W. J. Connell, for defendant in error.

REESE, J.

There is but one question involved in this case, to-wit, the constitutionality of chapter fifty of the Compiled Statutes of 1885, commonly known as the "Slocumb Liquor Law." The constitutionality of the act in question was presented to this court and passed upon in *Pleuler v. The State*, 11 Neb., 547, but the point now presented was not then considered. But the general proposition advanced in that case is applicable to this; which is, that "to justify a court in pronouncing an act of the legislature unconstitutional, it must be clear and free from reasonable doubt that it is so, not a doubtful and argumentative implication. Or, in other words, a statute should not be held invalid unless it is clearly forbidden by the paramount law. Such, substantially, has been the holding of all courts speaking upon this subject." See cases there cited.

The grounds upon which plaintiffs in error base their attack upon the law in question is, that no license can be issued to any person to sell liquor unless he be a resident of this state, and hence the law is absolute prohibition so far as it affects persons who are not residents; that it thus becomes prohibitory to non-residents and a license law to the citizen, and that this is in violation of article four of

the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" that it is also in violation of the fourteenth amendment to the same constitution, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

As we view the question here presented, it could serve no good purpose to enter into a lengthy discussion of the provisions of the constitution above cited. It is enough to say that we think they have no application to the case at bar. While it is true that every person, unless prohibited by some statute or other municipal enactment, has the legal right to sell intoxicating liquors, and to that extent may be denominated a "natural right," as insisted by plaintiff in error, yet it is not, perhaps, one of the *inalienable* rights of the citizen which are so sedulously guarded by the constitution and laws of our common country. From the earliest stages of our present civilization the sale of intoxicating liquors has been looked upon as a species of trade which was, or might be, injurious to the public weal; and hence it has been at all times considered a proper subject of police regulation, not as affecting the questions of the commercial interests of the country, but as affecting directly the welfare of the citizen and public morals. It has been held by this court and declared in the very able opinion written by Judge Lake in *Pleuler v. The State*, *supra*, that the act under consideration was not intended as a tax upon the traffic in intoxicating liquors, nor for the purpose of raising revenue, but was an exercise of the ample police power of the state for the purpose of *regulation*. In that case he says: "To our minds it is clear that the restriction (of the constitution) relied on has no proper application to this case, and that the authority given by the act regulating the sale of spirituous liquors is but a proper exercise of the police power of the state, of which, by the

constitution, the legislature is made the sole custodian and dispenser, and not an exercise of the power of taxation. That regulation of a traffic believed by the legislature to be pernicious in its effects upon society, and not the raising of revenue merely, is the chief design of the act, it would seem no man of intelligence can doubt who reads it."

In *Jones v. The People*, 14 Ill., 196, in speaking of the exercise of this power, Judge Trumbull, in writing the opinion, says: "By virtue of its police power every state must have the right to enact such laws as may be necessary for the restraint and punishment of crime, and for the preservation of the public peace, health, and morals of its citizens. It is upon this principle that the sale of lottery tickets and of cards and other instruments for gaming is prohibited, and whoever questioned the constitutionality or validity of such laws? A government that did not possess the power to protect itself against such and similar evils would scarcely be worth preserving."

We may be pardoned if we transfer to this page a part of section 995 of Mr. Bishop's excellent work upon the subject of statutory crimes. In discussing the general question now under consideration, he says: "The doctrine governing this whole subject may be summed up thus: The state, in the enactment of its laws, must exercise its judgment concerning what acts tend to corrupt the public morals, impoverish the community, disturb the public repose, injure the other public interests, or even impair the comfort of individual members, over whom its protecting watch and care are required. And the power to judge of this question is necessarily reposed alone in the legislature, from whose decision no appeal can be taken, directly or indirectly, to any other department of the government. When, therefore, the legislature with this exclusive authority has exercised its right of judging concerning this legislative question, by the enactment of prohibitions like those discussed in this chapter, all other departments of

the government are bound by the decision which no court has a jurisdiction to review."

Finding the police power of the state being thus plenary and complete, and that so long as the enactment is within the exercise of this power, we are relieved from any serious trouble arising out of the question here presented.

It is conceded that the legislature has power to regulate the sale of intoxicating liquors by a license to be issued before the sale can be lawfully made, or that it might, if it saw fit, prohibit the sale altogether. We think it must also be conceded that this would be an exercise of the police power. It must also be conceded that it has the right to require the execution of and delivery to the officers of the state the bond required by law in order that the community may be protected from the results of an improper use or abuse of the license. Why then has it not the power to say that the person to whom the license is issued, and who gives the bond shall be such an one as is subject to the laws of the state, and to the jurisdiction of her courts, and liable to their processes? Any other view would completely destroy the efficacy of the law, and deprive the people of the protection which the law is intended to give. x

Numerous instances might be cited where the legislatures, in the exercise of this power, have required that such persons, including corporations, as may have placed themselves within its provisions shall be citizens and subject to its jurisdiction, but is thought unnecessary to do so.

The act in question being the exercise of the police power of the state, and not for the purpose of revenue or of regulating commerce, it follows that it is not in violation of the constitutional provisions referred to, and the decision of the district court was correct. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

N. G. O. CODE, PLAINTIFF IN ERROR, v. WM. R. CARLTON, JOHN FITZGERALD, AND ALBRO J. AMES, DEFENDANTS IN ERROR.

Lien of Laborer on Railroad: ATTACHMENT. A. J. A. was a subcontractor under J. F. to build certain sections of a railroad, which work he again sublet to H., L. and L., who were performing said work. Upon the completion of said contract said J. F. would be indebted to A. J. A. \$2,413.27. H., L. and L. filed a statutory lien on said railroad for their work and labor in building said sections thereof. W. R. C., in the presence of A. J. A., presented for acceptance and payment to J. F. a draft or order drawn by A. J. A. on J. F. in favor of and payable to W. R. C. for the sum of \$1,041.50 in full of all claims. Whereupon J. F. stated to A. J. A., in the presence of W. R. C., that he would not pay it until all of the liens for labor on said sections were settled and paid off. N. G. O. C. sued out an attachment against A. J. A., and garnished J. F.; *Held*, That there was an equitable assignment and appropriation of the money payable from J. F. to A. J. A. to W. R. C. to the amount called for in said draft or order subject to the said statutory liens.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Field & Harrison, for plaintiff in error.

Harwood, Ames & Kelly, for defendant in error Carlton.

COBB, CH. J.

It appears from the record that on the 5th day of February, 1884, Wm. R. Carlton commenced an action in the district court of Lancaster county against John Fitzgerald and Albro J. Ames. In his petition the said Carlton alleged that on or before the 3d day of January, 1883, and ever since said time the said Fitzgerald had been and still was, but for the facts and circumstances thereafter set

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forth, justly indebted to the said Ames in a sum exceeding the sum of one thousand and forty-one dollars and fifty cents, and that on said 3d day of January, 1883, and before that time the said Ames was, and still is, justly indebted to the said Carlton in said sum of one thousand and forty-one dollars and fifty cents, and that on said last named date, in consideration of the said indebtedness, the said Ames made, executed, and delivered to the said Carlton his certain order or bill of exchange in writing in the words and figures following:

“CHESTER, NEB., Jan. 3, 1883.

“John Fitzgerald, please pay W. R. Carlton ten hundred and forty-one and $\frac{50}{100}$ dollars (\$1,041.50) as payment in full for all claims to date.

“(Signed)

A. J. AMES.”

That afterwards, and on or about the 21st day of January, 1884, the said Carlton presented said order to Fitzgerald, and requested him to accept the same, and that thereupon said Fitzgerald, in the presence of said Ames, told the plaintiff that he, said Fitzgerald, was owing said Ames several hundred dollars in addition to the amount of said order, but that said Ames had been a subcontractor under said Fitzgerald for the building of a certain line of railroad, and had in the prosecution thereof relet certain portions of said work to Higgins, Little, and Love, and that they had filed liens on said road for the certain amounts claimed to be due them by virtue of their respective contracts with said Ames, as aforesaid, and that he, said Fitzgerald, was unable to determine for what amount said claims and liens would be established, or were valid, nor how much, therefore, would remain in his hands due to said Ames after their satisfaction, and that he declined, therefore, to accept said order. But then and there, with the present consent of said Ames, agreed with and promised the plaintiff that whatever amount should remain

payable by him, Fitzgerald, to Ames, after the satisfaction of said liens, he would pay the plaintiff by reason of said order to the full amount thereof. Also that afterwards and on or about the 30th day of January, 1884, the plaintiff again presented said order to said Fitzgerald, and again requested him to pay or unconditionally accept the same, which said Fitzgerald again refused to do, using substantially the same language as hereinbefore recited, and saying to the plaintiff, in the presence and with the express assent of said Ames, that he, plaintiff, might rest perfectly easy, that whatever remained of the moneys in his hands due said Ames over and above the amount of said liens, he, said Fitzgerald, would pay the plaintiff to the full amount of said order, and that he would fully protect the plaintiff in the premises. It was further alleged in and by said petition that at all the times thereinbefore stated said Fitzgerald was owing and that he was still owing to said Ames a greater sum than ten hundred and forty-one dollars and fifty cents over and above all claims, liens, and demands, of whatever description, which the said Higgins, Little, and Love, all or any of them have, or at any time or now claim to have against the said Ames, or against or upon said line of railroad. That the said Ames is insolvent, and is a non-resident of this state, and has no property or effects whatever, except said moneys in the hands of said Fitzgerald, applicable to the payment of said demand.

With prayer for judgment, etc.

On the 12th day of June, 1884, N. G. O. Code applied for and obtained leave of court to intervene and answer in said cause, and on the 16th day of June following, filed his answer and cross-bill therein. In and by said answer he alleged that on the 30th day of January, 1884, he, the said Code, commenced an action in the district court of Lancaster county against the said Albro J. Ames, and caused an attachment to issue in said cause, and notice in

garnishment was served upon said Fitzgerald, defendant herein, and such further proceedings were had in said action that at the February term of said court, to-wit, March 24th, 1884, the said Code obtained a judgment against said Ames for the sum of \$2,455.94, debt and costs. The said Fitzgerald as garnishee in said cause appeared and answered, and from said answer the court found in the possession of said Fitzgerald property of said Ames in the sum of \$2,413.27, and on said 27th day of March the court ordered the said Fitzgerald to hold the same, subject to the order of the court.

Further, that at the time of the giving of the order mentioned in the plaintiff's petition by the said Ames to this plaintiff, the said Ames had no funds whatever in the hands of the said Fitzgerald.

That at the time of the commencement of this action, and of the service of garnishment on said Fitzgerald, said Fitzgerald had not accepted said draft and had refused to accept the same. That by virtue of said garnishment proceeding the said Code is entitled to receive or hold all of the said \$2,413.27, by this court found in the possession of said Fitzgerald belonging to said Ames; that no part of the above mentioned judgment obtained by him against said Ames has been paid.

Also denies that the plaintiff herein ever had or acquired any lien or claim whatever, by virtue of said alleged draft, upon the money in hands of Fitzgerald belonging to the said Ames, and denies each and every allegation in his petition contained, except as may be admitted herein.

With demand for judgment, etc.

On the 24th day of June, 1884, the defendant, John Fitzgerald, made and filed his answer in said action, wherein and whereby he admitted all the facts stated in said the plaintiff's petition, except what were therein denied or modified; said defendant averred that since the giving of the order by him referred to in plaintiff's petition,

he was garnished in the case of *N. G. O. Code v. Albro J. Ames*, and made his answer thereto in said court, which answer in garnishment he made a part of his answer herein. Defendant admitted that he had in his possession moneys belonging to one Albro J. Ames amounting to \$1,006.31, subject, however, to the order of Albro J. Ames on John Fitzgerald, in favor of said Carlton, and also subject to the said garnishment proceeding of *N. G. O. Code*.

That defendant did not know to whom said money belongs, and asks that the said court make such order in regard to the disposition of the money as should protect him, the said defendant, and prevent him from having to pay said money twice.

It also appears that on the 23d day of June, 1884, the said plaintiff Carlton made and filed his reply to the answer and cross-bill of the said Code, in and by which he denied each and every allegation of new matter in said answer and cross-bill contained.

Upon the trial to the court the answer of John Fitzgerald in garnishment in the case of *N. G. O. Code v. Albro J. Ames*, with exhibits thereto attached, was admitted in evidence, and constitutes the entire evidence in the case. Upon it the district court found for the plaintiff, and that there was due him from the defendant John Fitzgerald on the order set out in the petition the sum of one thousand dollars. And the court further found that there was due to defendant *N. G. O. Code* from said defendant John Fitzgerald the sum of fourteen dollars and eighty-one cents, upon his answer and cross-petition in said action, not including the amount, if any, that may be owing by said Fitzgerald after satisfying contested liens mentioned in his answer in garnishment introduced in evidence in said action. And thereupon the court rendered judgment in favor of William R. Carlton against John Fitzgerald for the said sum of one thousand dollars, and in favor of *N. G. O. Code* and against John Fitzgerald for the said sum of fourteen dollars and eighty-one cents.

The cause is brought to this court on error by N. G. O. Code. There is but one error assigned, although the same is stated in three different forms all amounting to the same proposition, to-wit: "That the findings and judgment are not sustained by the evidence."

In my view the evidence as contained in the bill of exceptions establishes the facts set out in the petition, and but for the peculiar attitude of the parties the sole question governing the case might as well have been presented by a demurrer to the petition.

I think that the facts set out in the petition and established by the evidence constituted an equitable assignment of whatever funds might prove to be in Fitzgerald's hands belonging or coming to Ames upon the completion of the work and the adjustment of the statutory liens thereon. By the drawing and delivery of the draft or order Ames agreed to such assignment; by its receipt and presentation to Fitzgerald, Carlton agreed to the same, and the verbal conditional acceptance by Fitzgerald was clearly binding on him within the terms of the limitations embraced in such acceptance. While it is true that it is not stated in the draft or order mentioned in the petition and referred to in the bill of exceptions that the same was drawn upon the fund in Fitzgerald's hands payable to Ames upon the completion of his sub-contract on the railroad, yet it was certainly so expressed, understood, and intended by Carlton, Ames, and Fitzgerald at the time of the presentation of said order to Fitzgerald and its qualified acceptance by him. While it may be granted that the making and delivery of the draft or order by Ames to Carlton did not amount to a legal appropriation of any particular fund to its payment, yet I think that those facts, taken in connection with the qualified verbal acceptance of the draft or order by Fitzgerald in the manner set out in the petition and bill of exceptions, and in the presence of both the drawer and holder thereof, did, upon the princi-

ples of all the authorities cited, amount to an equitable and irrevocable appropriation of this particular fund to the extent of the amount stated in said draft or order.

It is not contended, nor do I think it could be successfully, that Ames, after the facts and circumstances above referred to, could have maintained an action against Fitzgerald for the said moneys. If Fitzgerald could not have been sued by Ames then it is clear, both upon principle and authority, that he cannot be garnished by Ames' creditor. "A fundamental doctrine of garnishment is, that the plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses. When, therefore, the attachment plaintiff seeks to avail himself of the rights of the defendant against the garnishee his recourse against the latter must of necessity be limited by the extent of the garnishee's liability to the defendant." Drake on Att., § 458. The exception to the above principle need not be here referred to, as there was not even a suggestion of fraud in the case at bar.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHICAGO LUMBER COMPANY, PLAINTIFF IN ERROR, v.
GEORGE E. FISHER, DEFENDANT IN ERROR.

1. **Chattel Mortgage:** TRANSFER OF PART OF PROPERTY BY CONSENT OF MORTGAGEE. Where a debtor executed to his creditor a chattel mortgage upon a stock of goods, and retained possession of the goods, there being no agreement by which the mortgagor was to sell any part of the goods in the usual course of trade nor permission given him by the mortgagee so to do, the fact that a small part of the mortgaged property was, by

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the consent of the mortgagee, transferred to a third party in payment of a debt, would not of itself render the mortgage fraudulent and void as against creditors.

2. ———: PROPERTY NOT SUBJECT TO SALE ON EXECUTION AGAINST MORTGAGOR. Where a chattel mortgage is given to secure a *bona fide* debt, and the mortgagee has taken possession of the mortgaged property, or has the right to do so under the provisions of the mortgage, a judgment creditor of the mortgagor cannot, without the consent of the mortgagee, levy upon the mortgaged property, and sell it under execution. And especially would this be the case if the mortgaged property consisted of a number of articles such as a stock of goods. The remedy would be by garnishee process or such other proper proceeding as would reach the interest of the mortgagor after the debt due the mortgagee was paid.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Charles E. Magoon, for plaintiff in error.

R. D. Stearns, for defendant in error.

REESE, J.

This was an action in replevin by which defendant in error procured the possession of certain property on which he held a chattel mortgage.

Defendant in that action, plaintiff in error here, seeks a review by proceedings in error. The property, described in the mortgage at length, consisted of a stock of furniture, upholstering goods, etc. The mortgage was given for the purpose of securing the payment of a promissory note for the sum of one hundred and fifty dollars, which was given to cover rent due and to become due for the store building in which the furniture was kept. Plaintiff in error is creditor of the mortgagors and caused an execution to be levied upon the property, when this action was instituted for its possession.

The first contention of plaintiff in error is, that at the

time of the execution of the mortgage it was agreed that the mortgagors might continue to sell, in the usual course of trade, the mortgaged property, and that therefore the mortgage was fraudulent and void as to creditors.

The mortgage itself contains no provision giving this right, and we think the testimony fails to show any agreement of the kind at the time of the execution and delivery of the instrument. However that may be, the most that can be said as to such an agreement being made is, that there was a conflict in the testimony upon that point and the question was one for the jury to decide. *Johnson v. Phifer*, 6 Neb., 401.

The trial court instructed the jury that "a chattel mortgage of a stock of goods used in the way of retail trade, and where the mortgagor is allowed to continue in the possession of the property and to sell the goods in the usual course of trade, is in law fraudulent and void, as against the creditors of the mortgagor, no matter whether the parties intended any actual fraud or not." By this and other instructions the question here presented was fully submitted to the jury and they must have found that no such an agreement was made.

The testimony upon the question as to whether the mortgagors continued selling the goods after the execution of the mortgage is very meager, with the exception that a few articles of no great value were by the consent of the mortgagee transferred to some one in payment of a debt.

The court, among other instructions gave the following: "You are instructed that the mere fact (if such it be) that Fisher left the goods in the possession of the firm and knew that they were selling small parts of the same, will not of itself render the mortgage fraudulent and void as to defendants, but if you find that there was an agreement between the firm and plaintiff that they were to sell the goods the same as before and apply the proceeds to their own use this would render the mortgage void." The giving of this instruction is alleged as error.

In view of the testimony in the case we cannot say there was error in giving it. It is not the specific sale of a few articles of inconsiderable value, with the consent of the mortgagee, that makes a mortgage fraudulent, but where such sales are made in the usual course of trade, where there is a "floating mortgage which attaches, swells, and contracts as the stock in trade changes, increases, or diminishes, or may wholly expire by entire sale and disposition, at the will of the mortgagor. Such is no certain security upon specific property. * * * In such a case the whole right to dispose of the property to pay a debt depends on the will of the debtor." *Collins & McElroy v. Myers*, 16 Ohio, 554. The jury might well find that the sales made, if any, were not such as would disturb the lien of the mortgage, and that finding could not, under the rule stated in *Johnson v. Phifer*, be molested.

It is claimed that there is an irreconcilable conflict between instruction number four, given upon the request of defendant in error, and that numbered eight of those given upon the request of plaintiff in error. They are as follows:

"4. If you find that Fisher, the plaintiff, had actually taken possession of the goods at or before the time when the execution was levied (if you find that there was a levy) or that he had a right of possession under his mortgage, you are instructed that this would cut off any rights of the defendant under such execution and there would be no leviable interest in such goods, unless the mortgage was void as to creditors."

"8. The jury are instructed that the interest which a mortgagor possesses in and to the property mortgaged by him, is such an interest as may be seized and levied upon by execution while in his possession."

The objection to the first instruction and the support of the last seem to be based principally upon *Burnham v. Doolittle*, 14 Neb., 214. It may be observed that there was some testimony in this case tending to prove that defend-

ant in error had taken possession of the mortgaged goods prior to the levy by the officer. If that were true (and of which the jury were the sole judges), then, according to the decision in *Burnham v. Doolittle*, the proper remedy was by garnishment. But suppose he had not taken actual possession, but had the right to do so at any time, what condition would he then be in? To our mind that must depend to a great extent upon the character of the mortgaged property. In case that property consisted of a single or but few articles which might be followed into the hands of the purchaser and the lien of the mortgage be perpetuated, the mortgagee's interest might be protected and the *interest* of the mortgagor sold. But suppose the property consisted of a stock of groceries, as in the case of *Hedman v. Anderson*, 6 Neb., 392; or of a lot of upholstering goods, moulding, bureau handles, castors, etc., as in this case, how could such property be sold and delivered to purchasers without destroying the lien of the mortgagee? Most clearly it could not be done, and we do not think *Burnham v. Doolittle* so holds. In that case the then chief justice, Lake, in writing the opinion, says: "Having arrived at the conclusion that *an equity of redemption* is such an *interest* as may be reached by the process of attachment or garnishment before judgment, it only remains for us to determine whether the remedy afforded by the statute, giving the right of garnishment after judgment in aid of execution, was intended to be any less effective and complete in this respect." That case being a proceeding in garnishment, the court held that "whatever interest the judgment debtor had at the date of the service of the summons in garnishment in the two notes held as collateral security, which seems to be merely the equity of redemption, or whatever may remain of the proceeds thereof after paying the secured debt, the garnishee is answerable for." In this opinion it is said, and partly quoted in the brief of plaintiff in error, "But in view of our attachment law, and the ruling of the

supreme court of Ohio on a statute from which ours is copied, and upon more mature reflection, we are now satisfied that whatever interest a mortgagor of chattels may have in them, in this state, may be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment if they have passed into the hands of the mortgagee." If by this language the learned judge intended to say that, under all circumstances, where property is in the possession of the mortgagor, an execution or order of attachment may be levied upon the *property itself*, and the property sold, the mortgagee being thus in many instances wholly deprived of his security, we cannot agree with him. But if he intended to say that the interest—*i.e.*, the equity of redemption—might be seized upon as an *interest*, then we should not differ, perhaps. And this, we think, is in the line of reasoning adopted by the writer of that opinion, for he says, after citing *Carty v. Festemaker*, 14 Ohio State, 457: "The seizure of the property under the order of attachment, it was said, 'creates a lien in favor of the attaching creditor upon the interest of such mortgagor.' Now the interest of a mortgagor in property thus circumstanced, as to the mortgagee, is but the equity of redemption, or what may remain after the mortgage debt is paid. And if this interest be liable to attachment, as there held, it seems to follow necessarily that where property covered by a mortgage has passed into the hands of the mortgagee, the equity of redemption may be reached by garnishment, which is nothing but a species of attachment whereby property rights which the officer holding the order cannot 'come at' and take into his possession, may be brought within the jurisdiction of the court, and by its judgment subjected to the payment of the owner's debts."

But if we are wrong in this conclusion, it still remains that the case of *Burnham v. Doolittle* was one where it was sought to reach property of a judgment debtor in the hands

 In re Board of Public Lands and Buildings.

of a pledgee by garnishee process, and not by a direct levy of the execution on the thing pledged. And the question before the court was not whether the execution creditor could levy upon the pledge and deprive the pledgee of its possession. To that extent the decision is not authority in this case, except in so far as the reasoning employed may commend itself as sound.

If our view is correct, it follows that there is no such contradiction in the instructions as could mislead the jury to the prejudice of plaintiff in error.

As the other questions presented were principally questions of fact, upon which the jury were required to pass, and as they seem to have been fairly submitted, we will give them no further consideration.

As it does not affirmatively appear that the verdict was erroneous the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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43 189

 IN RE BOARD OF PUBLIC LANDS AND BUILDINGS.

Officers of State Institutions: APPOINTMENT AND REMOVAL.

The act defining the powers and duties of the board of public lands and buildings does not confer upon the board the authority to appoint and remove officers of state institutions of which they have supervision. Such appointments are to be made by the governor. *State v. Bacon*, 6 Neb., 286. *State v. Board of Public Lands and Buildings*, 7 Neb., 42.

THIS was a matter coming before the court upon the following letter:

OFFICE OF THE BOARD OF PUBLIC
LANDS AND BUILDINGS,
LINCOLN, NEB., Oct. 5, 1885.

To the Supreme Court of the State of Nebraska:

We, the undersigned members of the board of public

lands and buildings, would respectfully represent that a doubt exists in regard to the construction of section 10 of article V., entitled "Executive," and section 1, article XVI., entitled "Schedule" of the Constitution of the state of Nebraska, and sections 6 and 10 of chapter 40, of the Compiled Statutes of the state of Nebraska for 1885, entitled "Insane," and if not inconsistent with the duties of your honorable court, in order to further the proper execution of the law and the promotion of public service in this state, we would respectfully solicit an opinion from you upon the following question :

Does the appointment of the matron of the hospital for the insane lie in the governor or in the board of public lands and buildings, upon the nomination of the superintendent of the hospital for the insane?

Respectfully submitted,

E. P. ROGGEN,
Secretary of State.

C. H. WILLARD,
State Treasurer.

JOSEPH SCOTT,
Com. Public Lands and Buildings.

To this letter the judges replied as follows:

To the Honorable Board of Public Lands and Buildings:

GENTLEMEN—Deeming an answer to your communication of the 5th instant not inconsistent with our duties, we submit the following:

The powers of the board are defined by statute as follows: "They shall have general supervision and control of all the public lands, lots, and grounds, and all institutions, buildings, and the grounds thereto, now owned or that may hereafter be acquired by the state, including the saline lands, together with all salt springs, penitentiary lands, internal improvement lands and lots, as well as the state capitol building and grounds, the state penitentiary and grounds, the state hospital for the insane and grounds,

the asylum for the deaf and dumb and grounds, the asylum for the blind and grounds, and all other lands, lots, grounds, and buildings, now belonging or hereafter acquired by the state. *Provided, however,* That all lands, lots, grounds, and buildings or institutions set aside for and devoted to educational purposes be and hereby are excepted from the provisions of this act.

"Sec. 2. The board of public lands and buildings shall have the power to make general directions, according to law, for the sale, leasing, or other disposition of the lands, lots, and grounds belonging to the state as aforesaid, and shall give warrant by their proceedings as such board to the commissioner of public lands and buildings for his action in the sale and leasing of such lands, lots, and grounds, and shall require of the said commissioner a full and detailed report of all such sales, leases, and the funds thereby acquired as hereinafter directed.

"Sec. 3. The board shall have general custody and charge of all buildings and institutions, and the grounds thereto coming under the provisions of this act, and shall be responsible for the proper keeping and repair of the same, and shall require from the commissioner of public lands and buildings, who shall be the direct custodian of such institutions, buildings, and grounds, a report at least one in every three months, as to the condition of the same. *Provided,* That no additions shall be made to any public buildings without special appropriation of the legislature.

"Sec. 4. The board shall have power, under the restrictions of this act, to direct the general management of all the said institutions, and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institutions, and shall, on the part of the state, at regular meetings, as hereinafter directed, audit all accounts of such officers, including the accounts of the commissioner of public lands and buildings, except his salary.

The 5th and 6th sections relate to the mode of auditing and approving accounts.

Sec. 7. is as follows: "It shall be the duty of the board to take cognizance of all charges or complaints made against the said public officers, and at a regular meeting to give an impartial hearing to such charges and the defense against them, if any, and report the charges, evidence, and their conclusion in the matter to the governor within six days after the determination of such investigation." Comp. St., Ch. 83, Art. VII. These sections of the statute are all that relate to power of the board except in relation to the penitentiary, and it will be seen that the authority to appoint officers of state institutions is not given, while section 7 requires the board after examining charges against public officers to report the charges, evidence, and their conclusion in the matter, to the governor within six days. The object of this report evidently is to apprise the governor of the nature of the charges, the opinion of the board as to their truth or falsity, and to enable him to review the evidence and determine whether the conclusion of the board is justified or sustained by the evidence. If the board could remove an officer why should this report be required? Why bring to the attention of the governor charges if the board could act upon them and remove an officer? This provision repels the implication of any such authority in the board. *State v. Bacon*, 6 Neb., 289.

Our attention is called to section 6, Chap. 40, of Comp. St., which is as follows: "The board of trustees shall appoint, upon the nomination of the superintendent, a steward and matron, who, together with the superintendent and assistant physician, shall be styled the resident officers of the hospital, and shall reside in the same, and be governed by all the laws and by-laws established for the government of the hospital." This section was passed in 1873, and before the adoption of our present constitution. The act of 1873 vested the government of the hospital for the insane

in a board of trustees, who had authority as provided in section 6 above quoted. The constitution of 1875, however, abolished the board of trustees and vested the government of the hospital in the board of public lands and buildings, and, as we have seen, this board possesses no power to remove or appoint officers. This question was fully considered in *State v. Bacon*, 6 Neb., 286, and *State v. Board of Public Lands and Buildings*, 7 Id., 42, in which it was held that the board possessed no power to appoint or remove officers. These decisions were rendered after exhaustive arguments and careful examination of the subject, and as there has been no material change in the statute since that time, will be adhered to. The provision of section 10, that the governor shall appoint the superintendent and two assistant physicians, does not even by implication confer authority on the board to appoint the other officers. There being no authority in the board to appoint, that duty devolves on the governor as provided in the constitution.

AMASA COBB, *Chief Justice.*

SAMUEL MAXWELL, } *Judges.*
M. B. REESE, }

D. M. OSBORNE & Co., PLAINTIFFS IN ERROR, V. JACOB
KLINE, DEFENDANT IN ERROR.

1. **Answer:** NO EVIDENCE TO ESTABLISH DEFENCE: VERDICT.

Where the plaintiff's cause of action is admitted by the defendant in his answer, and the defense of payment is made thereto, but there is no evidence on the trial tending to establish such defense, the court should direct the jury to bring in a verdict in favor of the plaintiff.

2. **Argument:** OPENING AND CLOSING. That party against whom judgment would be rendered in case no evidence was given by either side, has the right (and it is his duty) to open the testimony, and also the right to open and close the argument.

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36	374
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47	184
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52	715
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56	363

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ERROR to the district court for Lancaster county. Tried below before POUND, J.

L. C. Burr, for plaintiffs in error.

J. C. Johnston and *J. C. Crooker*, for defendant in error.

COBB, CH. J.

This action was originally brought by D. M. Osborne & Co., plaintiffs, against Jacob Kline, defendant, on one promissory note for the sum of \$54 alleged to be due and payable on the first day of January, 1882. The action was brought by appeal to the district court of Lancaster county on the 5th day of February, 1883, and petition filed in said court describing the note as above. And on the 25th day of February, 1884, plaintiffs filed in said court, in said action, a supplemental petition on another note for the sum of \$53, due the first day of October, 1883.

The defendant made answer alleging payment of the said notes. For further defense he also set up in his answer that said notes were given for, and the sole consideration therefor was, the sale by the plaintiffs to the defendant of one Wheeler machine, an agricultural implement to use on his farm, for which defendant gave to plaintiffs the sum of \$160, evidenced by three several notes, the second and third of which are the notes described in the petition and supplemental petition in the said cause, and all of a like description, and made payable at different times. That the first thereof was paid by said defendant, and that on or about November 10, 1880, defendant sold said machine, by and with the consent and agreement of the plaintiffs, to one William Kappa, for the same sum he had paid for it by his notes aforesaid, and that the said William Kappa thereupon made his notes for the amount due on said machine payable to the order of the plaintiffs, and delivered

the same to plaintiffs, and the plaintiffs then and there promised and agreed to deliver his said notes of July 7, 1880, to the said defendant, and discharge him therefrom in full, with allegations that said plaintiffs, taking advantage of defendant's ignorance of the English language and way of doing business, only gave him one of said notes, but retained the other two, although often requested by the defendant to deliver the same to him, yet the plaintiffs have retained said notes, etc.

The case was tried to a jury, who found and rendered their verdict in favor of the defendant. The plaintiffs bring the cause to this court on error.

The following are the errors assigned:

"1. The verdict is contrary to the instruction of the court.

"2. The verdict is not sustained by the evidence.

"3. The verdict and judgment are contrary to law.

"4. The court erred in refusing to give instructions 1, 3, 4, and 5, as requested on the part of the plaintiffs.

"5. The court erred in allowing the defendant the opening and closing of the argument.

"6. The court erred in giving instructions No. 1 and 2, as given by the court on its own motion."

In examining these assignments of error we will take them up in the order in which they should have been, not that in which they are presented.

The instructions, the refusal to give which constitute the fourth ground of error, are in the following words:

"1. The jury are instructed that under the contract of agency between the plaintiffs and Henry Keefer, Mr. Keefer was not authorized to make an exchange of notes, and take the notes of said Kappa in the place of defendant's notes, and I instruct the jury that Mr. Keefer had no authority to make a novation of parties to said notes, and your verdict must be for the plaintiffs.

"3. The jury is instructed that in this case there is no

evidence that Henry Keefer was an agent of the plaintiffs to receive the money claimed to have been paid by the defendant to him, nor was he the agent of the plaintiffs, to receive payment of said notes, or either of them, and your verdict must be for the plaintiffs for the amount of the said notes and the interest thereon.

"4. The jury is instructed that there is no evidence that Henry Keefer was the agent of the plaintiffs to the novation of the payors to the notes sued in this action, and claimed to have taken place on the 10th day of November, 1880, in the answer of said defendant, and your verdict must be for the plaintiffs.

"5. The jury is instructed that you must find a verdict for the plaintiffs in the amount set forth in the supplemental petition."

The following instructions were given by the court on its own motion:

"1. The court instructs the jury that Henry Keefer had no authority to take the notes of one Kappa in exchange for the notes which had been given to the plaintiffs, D. M. Osborne & Co., by defendant, Jacob Kline, and if you find from the evidence that said Keefer made such exchange the plaintiffs are not bound thereby, and you will find for the plaintiffs for the full amount of the notes sued with interest according to the terms thereof, unless you further find from the evidence that the plaintiffs have ratified the acts of said Keefer in making such exchange.

"2. If you find from the evidence that said Keefer took the notes of said Kappa in exchange for the notes given to the plaintiffs by said Kline, including the notes sued on in this action, and that said Kappa paid to said Keefer the notes which he had given to him, and the plaintiffs with full knowledge that said Keefer had made such exchange received the money which Kappa had paid to Keefer, that would be a ratification of said Keefer's acts, and the plaintiffs are bound thereby, and cannot re-

cover, and you will find for the defendant. But in order to constitute such ratification the plaintiffs must have received such money, if they did receive it from said Keefer with full knowledge of all the facts."

It appears from the pleadings that on the 7th day of July, 1880, the defendant bought of the plaintiffs, through one Henry Keefer, their local agent at Lincoln, one harvesting machine, at the price of \$160, and gave therefor his three promissory notes, one for fifty-three dollars, due October 1, 1880; one for fifty-four dollars, due Jan. 1, 1882, and one for fifty-three dollars, due Jan. 1, 1883, payable to the order of D. M. Osborne & Co., at the First National Bank of Lincoln.

This suit was brought on the two last described of said notes.

There was evidence introduced on the part of the defendant tending to prove that some time in the fall of 1880 the witness Kappa agreed with the defendant Kline to take the said machine off of his hands, and settle or pay to the holders of Kline's notes a balance remaining due on the first to fall due of said notes, and the whole of the other two, and that on the 10th day of November of said year Kline and Kappa went to the office of Henry Keefer for the purpose of consummating said arrangement. Upon stating their object to Keefer he informed them that the notes had been sent to the bank, or to the company, and so he could not give Kline his notes back, but that he would take Kappa's notes, and give Kline a receipt for his notes. That thereupon Kappa executed and delivered to Keefer his note, payable to Keefer, for \$24.68, the supposed balance remaining unpaid on the first note, and his note for \$110, the supposed amount of the two other notes and interest, and also delivered to him as collateral security for said last mentioned note the note of one Jonathan Krug for the same amount. That thereupon Keefer, or some one in his office, executed and delivered to Kline his

individual receipt. This receipt having been put in evidence on the trial, I copy it here:

"LINCOLN, NEB., Nov. 10, 1880.

"Received of Jacob Kline one hundred and sixty dollars, amt. in full due for Wheeler machine, for two notes given, one due Jan. 1, 1882, for \$54.00, and one due Jan. 1, 1883, for \$53.00 payable to D. M. Osborne & Co.

"\$160.00.

HENRY KEEFER."

Kappa, who was sworn and examined as a witness on the part of the defendant, testified that he had paid both of his said notes to Henry Keefer. He produced the note for \$25.68, and filed it as an exhibit in the case, but he did not produce the note for \$110, nor was there any reason given or suggested for its non-production. But whether the said note was paid to Henry Keefer or not there was no evidence tending to prove authority, on the part of Keefer, to make the exchange of the said notes, nor to receive the money called for by the two original notes. And if he did receive it there was not a particle of evidence that he ever paid it or any part of it over to the plaintiffs, or that they ever received a dollar of it knowingly or unknowingly.

There can be no doubt then that the district court erred in giving the two instructions, one and two, because, there being no evidence of ratification before the jury, to instruct them upon that branch of law, however correctly as abstract propositions of law, was only to call the attention of the jury from the evidence to that which was not in evidence nor proper for their consideration.

As to the 4th point of error, the refusal of the court to give the instructions prayed by plaintiffs: While the said instructions were not as carefully or accurately drawn as they might have been they were substantially correct.

There was no evidence tending to prove that Keefer ever had authority to accept payment of either one of the

said three original notes. But on the contrary there was evidence that he ceased to be the agent of the plaintiffs for any purpose, more than two months before the change of notes as testified to by Mr. Kappa.

At the consultation by the judges it was suggested that possibly the verdict might be sustained on the ground that Keefer having the first note in his possession and accepting of two partial payments on it from Kline, and finally exchanging the note itself with Kappa for his note for the amount of the balance remaining unpaid, would be taken as evidence of his authority to collect that note, and that his authority to collect it might be deemed as some evidence of his authority to collect or exchange the other two notes taken at the same time, and for the same consideration. But upon thorough examination of the evidence it does not appear that Keefer ever had either of the three notes in his possession after the time of taking them from Kline. He testified to sending them to the plaintiff company after taking them, and supposed that they sent them to the First National Bank for collection when they approached maturity, as was their custom. There were two payments endorsed on the first note before the transaction of the 10th of November, but Keefer swears that neither was made to him, nor that either of the endorsements are in his handwriting. It appears that the first of these three notes to fall due was in the hands of defendant's attorneys, and offered in evidence on the trial, but there was no evidence as to how they or the defendant obtained possession of it. In the absence of such proof certainly no presumption of authority on the part of Keefer to control the other notes could possibly arise.

From the above considerations it follows that there was no evidence before the jury even tending to establish a defense to either of the two notes sued on. It was therefore the duty of the district court to direct a verdict for the plaintiffs.

It was never doubted that when plaintiff upon a trial fails to prove a point absolutely indispensable to his right to recover that the court should either grant a non-suit or direct a verdict for the defendant. And this rule of law is equally applicable to a case where the plaintiff's right to recover *prima facie* is established, as in the case at bar, by undisputed and indisputable evidence, and there is an entire want of evidence to sustain the defense. In such cases it is equally the duty of the court to direct a verdict for the plaintiff.

When it is clear that a finding of the jury for a certain one of the parties would be set aside for the want of evidence to sustain it, then it is trifling with the time as well as the rights of the parties, on the part of the court, to submit the case to the jury.

As to the fifth assignment, there was no error in the court's allowing the defendant's counsel to open and close the argument. Doubtless that party against whom judgment would be rendered if no evidence were introduced on either side had the right, and it was his duty, to open the testimony; and I think there can be no doubt of the rule that the party entitled to open the testimony has also the right to open and close the argument. Now in the case at bar the defendant, by his answer, admitted everything that was alleged by the plaintiffs in their petition, but plead payment. Accordingly, it was altogether unnecessary on the part of the plaintiffs to introduce the notes sued on in evidence, and their doing so could not change the *status* or rights of the parties in court.

The judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

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18	352
49	462

O. O. WELLS AND J. C. FLETCHER, PLAINTIFFS IN ERROR, v. WILLIAM LAMB, ASSIGNEE, ETC., DEFENDANT IN ERROR.

Assignment for Creditors: ATTACHMENT BY CREDITORS. A firm being in embarrassed circumstances prepared an assignment of their property for the benefit of their creditors, and held the same ready to be delivered to the sheriff. The assignment was prepared about one o'clock A.M., on Monday, and about five o'clock P.M. of said day the deputy sheriff appeared, apparently for the purpose of levying certain attachments on the assigned property. Before any attempt was made to levy the attachments, the assignment was delivered to and accepted by him, and on the next day transmitted to the sheriff, who had the same recorded immediately, the goods being in possession of the deputy sheriff. Three days afterwards other writs of attachment were issued and levied on the property. An assignee having been chosen by the creditors, who brought an action of replevin and obtained possession of the property, *Held*, That the assignee was entitled to the possession of the property.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Griggs & Rinaker, for plaintiffs in error, contended that the record showed the assignment was made Sept. 10, at 1 A.M., that it was handed to deputy sheriff about 4 P.M., Sept. 11, transmitted to the sheriff Sept. 12, and filed same day at 12:12 P.M. Hence, after the signing and acknowledging of said assignment thirty-nine hours elapsed before it was delivered to the deputy sheriff, and fifty-seven before it was filed for record. Therefore the assignee is not entitled to hold the property in controversy as against attaching creditors under the provisions of section 6, Ch. 6, Comp. Stat. Execution of the instrument does not include "delivery." The assignment was not filed for record within twenty-four hours after its execution. The defendant seeks to avoid this objection by urging that the instru-

Wells v. Lamb.

ment was not *executed* until it was delivered, and hence, as it was filed within twenty-four hours after it was handed to the deputy sheriff, it is valid. There are in the act itself two distinct declarations that *execution* does not include *delivery*, and in the absence of express words to the contrary a like meaning will be given to said word wherever it occurs in the act. *Pitte v. Shipley*, 46 Cal., 154. *Hoag v. Howard*, 55 Id., 564.

J. E. Cobbey, for defendant in error.

The word *executed*, as used in this act, was intended to have its ordinary legal meaning, and as counsel admit that *execute* ordinarily includes delivery, their argument must fall, and it is unnecessary to cite authority on this point. Plaintiffs in error participated in the assignment, and are now estopped from impeaching it. *Burrill on Assignment*, 747, and cases cited.

MAXWELL, J.

In September, 1883, Postlewait & Co. were doing business at Odell, Diller, and Reynolds, in this state, the firm at that time consisting of J. W. Bowen and John Postlewait. Being in failing circumstances, on the 11th day of September, 1883, they made an assignment under the statute to the sheriff of Gage county. Comp. Stat., Ch. 6. This assignment was duly recorded by the sheriff of said county on the 12th of that month, and possession taken by him of the property so assigned. Afterwards the defendant in error was duly chosen assignee by the creditors of said firm, and accepted the trust and qualified as required by law.

On the 14th of September, 1883, the property in question was taken from the possession of the sheriff of said county by Wells, who was the coroner thereof, and Fletcher, who was a constable, at the suits of a number of persons

who were creditors of Postlewait & Co. The assignee, on or about the 9th of October, 1883, demanded the goods in question from the plaintiffs in error, and upon their refusal to deliver them up brought an action of replevin and obtained possession of the property. On the trial of the cause the court found in favor of the assignee, and rendered judgment accordingly.

It appears from the evidence that the assignment was prepared about one o'clock on Monday morning of the 11th day of September, 1882, and was held by one of the partners, ready to be delivered to the sheriff. That about 5 o'clock in the afternoon of that day one Barnett, a deputy sheriff of that county, went to Odell for the purpose, apparently, of levying certain writs of attachment on the property in question; that soon after his arrival there, and before he had made his business known, one of the partners delivered the assignment to him and requested him to take possession of the property under the assignment, which he did. The assignment was sent the next day to Herron, the sheriff, who immediately had the same recorded. Other writs of attachment seem to have been issued on the 14th of that month and delivered to the plaintiffs in error, who levied upon the goods under the writs. The question involved is the right to the possession of the property.

Sec. 212 of the code provides that "An order of attachment binds the property attached from the time of service."

Sec. 205 provides that the "order of attachment shall be executed by the sheriff without delay. He shall go to the place where the defendant's property may be found, and there, in the presence of two residents of the county, declare that by virtue of said order he attaches said property at the suit of such plaintiff," etc. It will thus be seen that the sheriff had acquired no lien by the levy of the attachment at the time of the assignment, and that the attach-

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ment was not levied until three days after the assignment was made, and two after it was filed and recorded. The assignment was made under the act of 1883, and no reason has been given why it should be declared invalid. We must hold, therefore, that the right of the assignee is superior to the attachments, and the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

EUGENE BROWN, APPELLEE, v. COUNTY COMMISSIONERS
OF MERRICK COUNTY AND JOHN L. MEANS, AP-
PELLANTS.

18	355
26	186
28	433
18	355
29	286

1. **Counties: ADVERTISEMENT FOR BIDS FOR BRIDGES.** Where a county board advertise for bids for the erection of a public bridge which will cost to exceed \$500, in a newspaper printed and of general circulation in the county, and also with a considerable circulation throughout the state, but one advertisement continued for four consecutive weeks is necessary.
2. **—: SELECTION OF PAPER TO ADVERTISE IN.** Where the county board act in good faith, their decision as to the selection of a paper in which to advertise cannot be attacked in a collateral proceeding.
3. **Bridges Between Adjoining Counties.** Sections 87 and 88 of the road law merely authorize the county boards of counties separated by a stream to meet and confer together in regard to the erection, jointly, of a bridge across such stream, and to enter into a joint contract for that purpose, but in the absence of a contract there is no power in one board to erect or repair a bridge across such stream, and compel the other board to pay part of the cost.
4. **Counties: ERECTION AND REPAIR OF BRIDGES.** The court will not control the discretion of the county board as to what bridges they shall erect or repair, unless there is a clear abuse

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of the trust, even where there are not sufficient funds available to erect or repair all necessary bridges. So long as such board act within the scope of their authority, an injunction will not lie to restrain them.

5. ———: **BRIDGES BETWEEN ADJOINING COUNTIES: PRECINCT BONDS.** Where the middle of a stream is the dividing line between two counties, and a bridge is erected across said stream by the county board of one of such counties, without the co-operation of the county board of the other, the county erecting the bridge may use precinct bonds, voted for that purpose to complete the bridge in the county not co-operating in the erection of the bridge.
6. **Bridges: INJUNCTION DOES NOT LIE TO RESTRAIN PAYMENT TO CONTRACTOR.** A tax payer who seeks to enjoin the payment of money for the erection of a public bridge which he claims is being constructed in violation of law, must act with reasonable promptness. If he is guilty of gross laches, and knowingly permits the contractor to incur liabilities in good faith in the construction of the greater portion of the work, an injunction will be denied.

APPEAL from Merrick county. Heard below before Post, J.

John Patterson, for appellant commissioners. *O. A. Abbott*, for appellant Means.

A. Ewing and *M. Whitmoyer*, for appellee.

MAXWELL, J.

This action was brought in the district court of Merrick county to enjoin the county commissioners of said county from issuing the warrants of Merrick county to John L. Means for building a public bridge across the Platte river south of the village of Clarks in said county, and the treasurer from paying or registering the same, and to have a contract entered into by said commissioners with said John L. Means on or about the 20th of September, 1884, for the erection of said bridge, declared null and void. On

the trial of the cause the court below found the issues in favor of the plaintiff, and made the injunction perpetual.

It appears from the record that on the 19th day of August, 1884, the county commissioners of Merrick county issued a proclamation for a special election in Clarksville precinct, to vote on a proposition to issue the bonds of said precinct to the amount of \$3,000, to aid in building a bridge over the Platte river south of the village of Clarks; that at the time this proposition was submitted there was a public bridge over the river near the point where it was proposed to erect the new one; that this bridge had been erected largely with funds provided by the precinct, but the bridge was then a public thoroughfare under the control of the county commissioners; that by reason of the high water in 1884 and decay, the bridge had become unsafe for travel, and it was necessary either to make expensive repairs thereon or rebuild it. At the time the county commissioners submitted the proposition for bonds in Clarksville precinct they caused an advertisement to be published in the *Nonpareil*, a newspaper published at Central City, in said county, for proposals to erect the bridge in question, and use such materials in the old bridge as were suitable for that purpose. In pursuance of such notice, the proposition for bonds having carried in Clarksville precinct, the commissioners on the 20th day of September, 1884, let the contract for the bridge in question to John L. Means, one of the defendants, for the sum of \$3.25 per lineal foot. Mr. Means commenced work at once, and on the 7th day of December, 1884, when this suit was commenced had performed about three-fourths of the labor in building the bridge. It also appears that at the letting of the contract there were a number of other bidders and that Mr. Means was the lowest bidder. The Platte river at the point where the bridge is located has a number of channels, the widest one being on the south side, and the boundary line between Polk and Merrick

counties is the middle of the south channel. There is testimony in the record from which it may be inferred that the county commissioners of Polk county refused to join with the commissioners of Merrick county in erecting the bridge. It also appears that the cost of repairing the old bridge would have been, as Mr. Means testifies, about \$7,000. The plaintiff is a resident and tax payer of Merrick county, and has resided there for several years. In his direct examination he states that he was not aware of the building of the bridge until the 6th day of December, 1884. On cross-examination, however, he states he took and read the county newspapers, including the *Non-pariel*, in which the notice was published; that he saw the advertisement for the letting of the contract; that he knew of the letting of the contract for the construction of the same. He had formerly been one of the county commissioners of Merrick county and evidently is a man of at least ordinary intelligence. His statement, therefore, on his direct examination, unless the result of oversight, is somewhat remarkable.

The first ground in the petition upon which an injunction is claimed is, in substance, that the bridge is about 2,500 feet in length, and will call for the expenditure of \$8,325, and no advertisement was published in any newspaper published outside of Merrick county asking for bids for the building of said bridge, prior to the letting of said contract; nor did said county commissioners of record at any time prior to the letting of said contract, in their public proceedings whilst sitting as a board for the transaction of the business of said county, direct any advertisement to be published in any newspaper published in said county, asking for bids for the building of said bridge. 2d, Because the Platte river separates Merrick from Polk county, and the whole expense is to be borne by Merrick county; 3d, The amount of road and bridge fund in Merrick county in the treasury at that time did not exceed the sum of

\$2,389.69, and that the amount of the levy for those funds for 1884 did not exceed the sum of \$6,241.83, and no distinct road fund, and that but two-thirds of the levy is available for the current year, etc., the amount to be expended on said bridge being in excess of the funds available for that purpose. It is also alleged that on the 7th day of October, 1884, the commissioners delivered to Means a warrant on the bridge fund of said county for the sum of \$1,200, and on the 11th day of November of that year a warrant for \$1,800 on said fund, "thus anticipating and undertaking to prevent and make useless the taking appeal on the part of any tax payer of said Merrick county who might desire to appeal to the district court from their order allowing said warrants within ninety days from the making of the same," etc. These grounds will be considered in their order.

First, The advertisement.

Sec. 84 of the act in relation to roads (Comp. St., 7, Ch. 78,) provides that, "Before any contracts as aforesaid shall be let, the county commissioners shall advertise for bids therefor, and shall require bidders to accompany their bids with plans and specifications of the work, and they may accept the most suitable plan and award the contract accordingly, or may reject any or all bids."

"Sec. 85. Such advertisement shall state the general character of the work, and shall be published four consecutive weeks in some newspaper printed and of general circulation in the county; and where the cost of the work exceeds five hundred dollars such advertisement shall also be published in some newspaper printed in and of general circulation throughout the state."

The amount required to construct this bridge clearly brings it within that class of cases where the advertisement must be published four consecutive weeks in a newspaper printed and of general circulation in the county, and also in a newspaper printed in and of general circulation

throughout the state. A newspaper may have so general a circulation as to embody both of these conditions. In such case it would not seem to be necessary to insert the advertisement in two papers, as the advertisement in one would accomplish all that was desired, viz., publicity, in order that competition in bidding may be induced and contracts let for the lowest price possible. The county board, however, are to determine in the first instance the paper or papers in which the advertisements are to be inserted, and if they act in good faith, although erroneously, in carrying out the law, their acts in that regard are not open to collateral attack. *Com. of Knox County v. Aspinwall*, 21 How., 539. *Brown v. Otoe County*, 6 Neb., 115. *Ellis v. Karl*, 7 Neb., 382. There is no charge of bad faith on the part of the commissioners or of fraud or corruption. The testimony shows that from seventy-five to eighty copies of the *Nonpareil* circulated in nearly all parts of the state outside of Merrick county. Other papers in the state no doubt have a much greater general circulation in the state, but in the absence of fraud, corruption, or bad faith on the part of the county board, or of injury to the plaintiff, which is not claimed, this cannot be inquired into in this collateral proceeding. Their first ground for injunction, therefore, is not well taken.

Second, Because the Platte river separates Merrick from Polk county, and the expense should be borne equally by those counties.

Sec. 87 of the act relating to roads provides that "bridges over streams which divide counties, and bridges over streams on roads on county lines shall be built and repaired at the equal expense of such counties," etc.

Sec. 88 provides the mode in which counties may enter into joint contracts for the erection and repair of such bridges. The provisions of the statute apply only to cases where adjoining counties have jointly constructed a bridge or bridges over a stream which separates them, or to joint

contracts of such counties for the erection of such bridges. There is no provision in the statute in the absence of an agreement by which one county may compel an adjoining one to join in the erection or repair of a bridge across a stream separating one county from the other. This question was before the supreme court of Illinois under a similar statute. *Com's of Highways v. Com's of Highways*, 100 Ill., 631. After copying the sections of the statute, it is said: "Neither of these sections directly or indirectly confers authority upon the commissioners of one town to compel the commissioners of an adjoining town to repair or erect a bridge on a town line, or pay one-half of the cost of such bridge after it may be erected or repaired." *The State v. Kearney County*, 12 Neb., 6. The second ground, therefore, is insufficient.

Third. That the amount of road and bridge fund on hand at the time the contract was let did not exceed \$2,089.69, while levy for those funds for that year was the sum of \$6,241.83, but two-thirds of which was available. This would place at the disposal of the commissioners more than \$6,000 of the road and bridge fund, to which should be added the Clarksville precinct bonds, making more than \$9,000 in all. The exact length of the bridge does not appear, being estimated at from 2,100 to 2,500 feet. This at \$3.25 per lineal foot, even if we take the greatest length shown, would amount to but little more than \$8,000. Mr. Kramer, one of the county commissioners, states that before letting the contract the commissioners measured the river by tying a band around the felloe of a wagon wheel, and counting the revolutions, and that the width of the river was about 2,100 feet. He also testifies, in substance, that in the opinion of the commissioners, upon actual view, the best interests of the county required the construction of a new bridge.

In *State v. Kearney County*, 12 Neb., 6, it was held that where there are not sufficient funds in the county

treasury to repair all the bridges in a county, the court will not control the discretion of the county board as to what bridges they shall erect or repair unless there is a clear abuse of the trust. The erection and repair of bridges in a county are specially committed to the county board of each county. Such board are presumed, from personal inspection or otherwise, to know what bridges should be erected or repaired. So long, therefore, as such board act within the scope of their authority an injunction will not lie to restrain their action. But it is said that even if the board had authority to construct that portion of the bridge in Merrick county it had no power to cross the line into Polk county and erect a bridge in that county. This, if applied to a stream wholly in Polk county, doubtless is true; but when applied to a stream partly in both counties is not so clear. Nor is the question presented in this case. The statute provides that the southern boundary of Merrick county shall be the middle of the south channel of the Platte river. (Comp. Stat., Ch. 17.) The width of the south channel of the river is shown to be about 1,300 or 1,400 feet.

The right of the county board to use the bonds donated by Clarksville precinct for the completion of that portion of the bridge in Polk county is unquestioned. *Railroad Company v. Otoe County*, 16 Wall., 667. *Walker v. City of Cincinnati*, 21 O. S., 14. *Sharpless v. Mayor*, 21 Penn. St., 147. *Goddin v. Crump*, 8 Leigh, 120. If this was not so the right to make donations to railways as public highways could not be maintained. In *Railroad v. Otoe County* a donation to a railway company in Iowa which proposed to run its road to the east bank of the Missouri river opposite or near Nebraska City was sustained. While in *Walker v. Cincinnati* the power of the city to issue its bonds for the purpose of constructing a railroad from Cincinnati south through one or more states was confirmed. The testimony shows that there are less than 700 feet of

the bridge in Polk county, the cost of which was less than \$2,000, leaving probably not less than \$1,000 derived from bonds to be expended on other parts of the bridge. The county board, therefore, need not, and probably did not, expend any part of the road and bridge fund in Polk county. The third cause, therefore, is untenable.

Fourth. But even if the county board had exceeded its powers somewhat, a tax payer could not wait until the contractor had performed a considerable portion of the work of which the public would have the benefit, and which would be lost to the contractor, and then enjoin the payment of the work. *Whitney Arms Co. v. Barlow*, 63 N. Y., 63. *City of East St. Louis v. The E. St. L. G. L. Co.*, 98 Ill., 415. *Bradley v. Ballard*, 55 Id., 413. *The Rider L. R. Co. v. Roach*, 97 N. Y., 378. *Tash v. Adams*, 10 Cush., 252. In the last case cited the inhabitants of the town of Natick appropriated \$500 for the celebration of the second centennial anniversary of the settlement of the town, and authorized the committee appointed for that purpose to draw from the town treasury an amount not exceeding the sum named. The committee acting under this vote proceeded to make contracts on behalf of the town for the purpose named and expended thereby the sum of \$463.00. The celebration took place on the 8th of October, 1851, under the sanction of the town, and all the expenditures were made prior to that time. On the 18th of October, 1851, the action was brought to enjoin the payment of the money. The court say (page 253), "It is a well established rule in equity that if a party is guilty of laches or unreasonable delay in the enforcement of his rights he thereby forfeits his claim to equitable relief. This rule is more especially applicable to cases where a party being cognizable of his rights does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character." In *East St. Louis*

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v. *East St. Louis G. L. Co.* the defense was placed solely on the ground that the city had no power to make the contract. It was held even if there was a defect of power in the corporation to make a contract, yet if the contract was not in violation of its charter, or of any statute prohibiting the contract, and the corporation had induced a party who relied on the contract to expend money in the performance of the same on his part, the corporation would be liable.

In *Hitchcock v. Galveston*, 96 U. S., 341, the city council of Galveston had contracted with Hitchcock and others for the construction of sidewalks, to be paid for by the issue of city bonds. After the work was partly performed the city council stopped the work and prevented its completion. In an action for breach of the contract it was contended that for want of power to issue the bonds the entire contract was void, and no action could be maintained for a breach thereof. But the court held the city liable. *State Board of Agriculture v. The Citizens Street Railway*, 47 Ind., 407. And this was the rule adopted by this court in *Clark v. Dayton*, 6 Neb., 192.

The plaintiff in this case permitted Means to expend his money without objection, in the erection, or rather reconstruction, of the bridge, although he knew, or at least had the means of knowing, that the contract had been let and the bridge was then being constructed. Yet he waited before bringing this action until the work was so far completed that in order to preserve what had been done it was necessary to complete the bridge. It is but justice, therefore, that the contractor should be paid for his work.

There is no equity in the bill. The judgment of the court below is reversed and the action dismissed.

REESE, J., concurs.

COBB, CH. J., concurs in the judgment on the ground last stated.

A. L. STRANG, PLAINTIFF IN ERROR, V. C. KRICKBAUM,
DEFENDANT IN ERROR.

Jurisdiction of Justice. A justice of the peace has jurisdiction to the extent of two hundred dollars in an action founded on a bond, bill, promissory note, or other instrument in writing, for the payment of a sum of money certain. *Bullock v. Jordan*, 15 Neb., 665. *Burton v. Manning*, Id., 669.

ERROR to the district court for York county. Heard below before NORVAL, J.

A. C. *Montgomery* and *Groff & Montgomery*, for plaintiff in error.

Scott & Gilbert, for defendant in error.

MAXWELL, J.

In December, 1882, the plaintiff brought an action against the defendant before a justice of the peace upon two promissory notes, dated December 23, 1879, each for the sum of \$50.00, with interest at ten per cent. The defendant set up a counter-claim for \$50.00, and on the trial of the cause the jury returned a verdict in his favor for the sum of \$15.00. The plaintiff then appealed the cause to the district court, where the *defendant* filed a motion as follows: "Comes now the defendant and moves the court to dismiss the cause, for the reason that the justice had no jurisdiction of the subject matter." The motion was sustained and the action dismissed. The defendant has failed to furnish a brief, and we are left entirely to conjecture as to the grounds upon which the want of jurisdiction was predicated. It was probably based upon section 1100 of the Code, which requires the justice, upon entering judgment upon a bond, bill, promissory note, or other instrument of writing for the payment of a sum of money cer-

tain, to endorse thereon the sum for which he shall have entered judgment, "provided the same shall not exceed one hundred dollars," etc.

This question was before this court in *Bullock v. Jordan*, 15 Neb., 665, in which it was held that section 1103 as amended in 1881, whereby the jurisdiction of justices of the peace was extended to \$200, controlled section 1100, and that therefore the apparent limitation in section 1100 to \$100 was repealed. The same ruling was had in *Burton v. Manning*, 15 Id., 669. These cases are decisive of this. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HENRY KELLER, PLAINTIFF IN ERROR, v. JOHN KELLER, DEFENDANT IN ERROR.

1. **Account Stated.** The *prima facie* presumption is in favor of an account which has been stated by the parties, and as a general rule it will not be disturbed unless there was fraud or mistake in the settlement which is established by clear proof.
2. ———: **EVIDENCE.** Where there has been a settlement of accounts between parties, and a promissory note given by one of them for the amount found due, the burden of proof is on the maker of the note to show that the settlement did not include debts owing to him from the adverse party.

ERROR to the district court for Clay county. Tried below before WEAVER, J.

Hayes & Taggart and *W. P. Shockey*, for plaintiff in error.

Hurd & Matters, for defendant in error.

18	896
55	936
18	866
61	662

MAXWELL, J.

This is an action upon a stated account, and the defense a denial and plea of set-off. On the trial of the cause the jury returned a verdict in favor of the defendant. The principal error relied upon is, that the verdict is against the weight of evidence and law of the case.

It appears from the evidence that the parties are brothers; that they settled in Clay county in 1873, the plaintiff at least taking a homestead. Another brother named Gotfried had settled in that county also, and the three seem to have assisted each other in the cultivation of their land, and had mutual dealings. In 1878 a settlement was had, and a balance found due the plaintiff from the defendant, who, it is claimed, thereupon executed a note to the plaintiff for the sum of \$317.59, due in four years, without interest. The plaintiff claims that this note was surrendered to the defendant a few days after its execution, upon his promise to pay one-half of the face value thereof out of his share of an estate that he was about to receive. All the testimony tends to show that there was a settlement between the parties as claimed by the plaintiff, and the execution of the note by the defendant to the plaintiff. There is also testimony which tends to show that this note was given for the balance due the plaintiff. The defendant in his evidence admits the execution and delivery of the note, but claims that it was given without consideration. All the charges in the alleged set-off, except \$10.50 for three sacks of flour, are for matters existing prior to the settlement.

The *prima facie* presumption is in favor of an account which has been stated by the parties, and the general rule is that it will not be disturbed except for fraud or mistake in the settlement which is established by clear proof. *Valentine v. Valentine*, 2 Barb. Ch. R., 430. *Stenton v. Jerome*, 54 N. Y., 480. *Lookwood v. Thorne*, 11 N. Y.,

Keller v. Keller.

170. And the burden of proof is upon the party denying the correctness of the account. *Chappedelaine v. Dechenaux*, 4 Cranch, 306. *Kennedy v. Goodman*, 14 Neb., 585. Where, however, fraud or mistake is shown, the settlement will to that extent be considered as having been made upon mistake or imposition, and the omissions or mistakes will be corrected.

In this case there is no allegation in the answer of fraud or mistake in the settlement. It is denied that there was a settlement, but in this it is clearly proved to be untrue. The burden of proof is upon the defendant, therefore, to show that his account then due was not taken into consideration in the settlement. If the plaintiff had been indebted to the defendant at that time, as he claims, it is not very probable that he would have executed a promissory note to the plaintiff for the amount found due to him. The issues seem to have been made up by the parties under a misapprehension as to the evidence, hence the real questions in the case—those relating to the stated account—were not fairly submitted to the jury. This may be remedied in another trial. As the verdict is against the clear weight of evidence a new trial must be awarded.

REVERSED AND REMANDED.

THE other judges concur.

18 359
551 481

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V.
CHRISTIAN C. SHOEMAKER, DEFENDANT IN ER-
ROR.

1. **Railroads: DAMAGE TO STOCK.** Under the provisions of sections one and two of Chap. 72, of Comp. Statutes, where a party's horse gets on the railroad track for the want of a fence, such as the law requires the company to erect and maintain to enclose its track, and while on or near the track is frightened by a passing train, and in its flight is injured by falling through a bridge on the line of the railroad, and no negligence or willful misconduct is chargeable to the agents of the company in charge of the train at the time, and where no injury is done to the horse by any actual collision or contact with the engine or cars of the train, the railroad company will not be liable to the owner of the horse for such injury. See *Schurtz v. I. B. & W. R. R. Co.*, 107 Ill. R., 577.
2. ———: ———: **STATUTE CONSTRUED.** The true meaning of sections one and two of Chap. 72, Comp. Stat., is, that the injury to stock must be caused by actual collision; that is, it must be done by the agents, engineers, or cars of the company, or the locomotives, engines, or trains of any other corporation permitted and running over or upon the said road, or the willful misconduct of the train men in the course of their employment to make the company liable. *Id.*
3. ———: ———. Consequential damages resulting from fright to animals, not caused by actual collision, or any negligence or willful misconduct on the part of the servants of the company, are not embraced in the statute. *Id.*

ERROR to the district court for Otoe county. Tried below before POUND, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error, cited: 1 Rorer on Railroads, 641. 2 *Id.*, 1579. *Hadden v. Rust*, 39 Ill., 194. *R. R. Co. v. Hasket*, 10 Ind., 409. *R. R. Co. v. Thomas*, 60 *Id.*, 107.

C. M. West and *F. M. Fee*, for defendant in error.

COBB, CH. J.

This action was brought in the district court of Otoe county by Christian C. Shoemaker against the B. & M. R. R. Co. in Nebraska. Said plaintiff, by his petition, after alleging that the defendant is a corporation, etc., states as his cause of action:

"That on the evening of the fourth day of June, or the morning of the fifth day of June, 1883, said defendant was operating its railroad in Otoe county, Nebraska, said road had been open for more than six months for use in said county. While so operating the same at the time above stated, at a place on said road where it was required by law to fence its track, but had failed to do so, said defendant, by its agents and employes, ran an engine and train of cars over and against one gray mare, being the property of plaintiff, and of the value of \$175, by reason of which said mare was injured, from which injuries she died. Wherefore plaintiff claims a judgment against said defendant for the sum of \$175 and costs."

The defendant's answer consists of a general denial. The case was tried to a jury, who found and rendered their verdict for the plaintiff, and assessed his damages at \$137.75.

The defendant's motion for a new trial having been overruled, it brings the cause to this court on error; there are but two substantial errors assigned.

"*First.* The court erred in refusing to give the first instruction requested by the plaintiff herein marked '1st.'

"*Second.* The court erred in giving the third instruction, marked '3,' on its own motion."

The instruction No. 1 requested by defendant is as follows:

"1. The jury are instructed that the evidence in the case will not warrant you in finding a verdict against the defendant. You will therefore decide for the defendant."

Instruction No. 3, by the court on its own motion, is as follows:

"3. If the place where said accident to plaintiff's mare happened was not within the limits of any town, city, or village, it was the duty of the defendant to erect and maintain fences on the sides of the railroad on the part thereof open for use, suitable and amply sufficient to prevent cattle and horses, etc., from getting on such railroad."

It appears from the evidence as set out in the bill of exceptions that the plaintiff was the owner of a certain gray mare, which, on the day of the night in question, was lariatied by him out on the prairie, and it is supposed that she got loose from the lariat "and happened down on the railroad for some cause, where McKee had a pasture fenced, and wanted to go there I suppose."

That on the following morning she was found in McKee's pasture near the railroad, with her leg broken. There were animal's tracks on the side of the railroad passing along on the south side of the track for nearly an eighth of a mile to near a bridge across a considerable creek. Upon the bridge there were hairs and other signs indicating that a gray animal had fallen from the bridge into the creek. There were also signs on the margin of the creek below showing where it had fallen; and by following the tracks out of the creek and through a cornfield and pasture, the owner was enabled to find the mare in her crippled condition. The owner, as well as another witness, testified to hearing a train, and only one, pass during the night. On the other hand, two witnesses on the part of the defendant, to-wit, the conductor of the said train and another person who was on the caboose of a train which passed that point between twelve and one o'clock that night, testified that that was the only train which passed there that night; that said train consisted of nineteen freight cars and a caboose, going east; that between twelve and one o'clock, about a mile and a half west of Syracuse, the train being running at about the rate of fifteen miles per hour, the witness (one of them) standing

looking out of the south door of the caboose with his conductor's lantern in his hand, the train passed two animals, one dark and one gray, the gray one ran a hundred yards by the side of the freight cars and as the way car passed her she jumped right in the center of the track; that that was the last the witness saw of her; that the train passed the bridge very shortly after passing the animals and where the gray mare jumped on to the track; that neither the engine nor any part of the train struck either of the animals or any animal on that night; that the animals seemed greatly frightened and ran for a considerable distance along and near the track before the train passed them.

There was thus not only no evidence of the train having struck the animal, but the evidence of two witnesses that the train passed her without striking her.

Our statute, sections one and two of chapter 72, Comp. Stat., after providing that railroads shall be fenced, etc., proceeds as follows: "And so long as such fences and cattle guards shall not be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same as herein prescribed is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engineers, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporation permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon."

Again, "Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof against all live stock running at large, at all points, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employees, or engineers, or by the agents, employees, or engines belong-

ing to any other railroad company running over and upon such road or there being."

The statutes of Illinois, Indiana, and Missouri on the subject of the liability of railroad companies, whose tracks are suffered to remain unfenced, for live stock killed by their trains, are substantially the same as those of our own state above quoted, and the supreme courts of each of those states in the cases cited in the brief of counsel have, upon facts quite similar to those of the case at bar, held, that an actual and direct collision by the engine or train, or some portion of it, with the animal killed or injured is indispensable to a holding of liability on the part of the company. The reasoning of these cases rests chiefly upon the meaning of the words of the statute. That the language of the statute making the company "liable for all damage which may be done by the 'agents, engines, or cars' of such corporations to cattle, horses, or other stock" could not be extended to embrace damages done to themselves by such stock in consequence of fright, although such fright might be caused by the sight or sound of passing trains on such unfenced railroad. The opinion in the Missouri case is predicated, in part, also, upon the object of the act declaring the liability in cases of damage to stock by the "agents, engines, or cars" of railroad companies whose tracks remain unfenced. Such object being declared to have been "not exclusively for the benefit and protection of the owners of stock who were liable to suffer loss and damage, but also as a public regulation for the safety of passengers, and the traveling public, who are exposed to danger and peril in case of collision." To these considerations the following may be added: One object which the legislature had in view in the passing of these provisions was to induce the railroad companies to fence their tracks, and keep them fenced. It therefore sought to hold the owners of unfenced railroads absolutely liable for such damage to live stock as only might proximately result

from the *unfenced* condition of the railroad, and not for such as might be common to all railroads fenced as well as unfenced. The statute of no state, to my knowledge, has prescribed the distance which the fence shall be from the track over which the trains pass. And in point of fact, in the case of some of the best fenced railroads they are at some points very near. And any person of experience knows that it often occurs that horses and teams driven on the highway near a railroad track, but outside of the fence, become frightened at the sight and sound of passing trains, and by reason of such fright damage themselves, their drivers, and the vehicles to which they are attached. The liability of such animals to become thus frightened, and to become thus damaged, depends in no degree upon the fenced or unfenced condition of the railroad. Hence it is obvious that in declaring an absolute liability for damage to live stock by trains in cases where the railroad should be suffered to remain unfenced as an inducement and incentive to railroad companies to fence their tracks, and thus protect the lives of the traveling public, as well as the property of the citizens of the country through which the railroad passes, from loss by collisions, the legislature only had in view such damages to live stock as were practically confined to unfenced railroads, and not such as were common to all railroads fenced as well as unfenced.

Therefore, upon reason as well as upon authority, the case made by the plaintiff in the court below failed to establish a liability upon the railroad company for the damage to the gray mare, and the district court should have told the jury so.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

JOHN KING, PLAINTIFF IN ERROR, V. STATE OF NE-
BRASKA, DEFENDANT IN ERROR.

18	375
18	540
18	375
40	527
18	375
51	37

1. A Recognizance for the appearance of a person charged with an offense is an obligation of record, and becomes such when taken and filed in the court to which it is returnable.
2. ———. By the provisions of the Criminal Code a recognizance taken by a justice of the peace acting as an examining magistrate becomes an obligation of record when returned by the justice of the peace to the clerk of the district court, and is by him entered of record as required by section 383 of the Criminal Code.
3. ———. A recognizance proper, unless when taken out of court, should not be signed; but when it is properly taken and certified the signatures of the recognizers may be treated as surplusage and the instrument held valid. *Irwin v. The State*, 10 Neb., 325.
4. ———. The Criminal Code does not require a recognizance taken by a justice of the peace when sitting as an examining magistrate to be entered upon his docket.
5. ———. Where a person was charged with the commission of an offense, and upon being held to bail by the examining magistrate, entered into a recognizance with sureties for his appearance at the next term of the district court, and subsequently left the state, and committed a crime in another state where he was arrested and imprisoned, and thus by his own voluntary act rendered it out of his power to appear in this state to answer to the crime with which he was charged; *Held*, That these facts would constitute no defense to an action against his sureties upon his recognizance.
6. ———. Where a recognizance was given for the appearance of a defendant to answer a "charge against him for larceny," *Held*, That the fact that the complaint was defective could not be asserted as a defense to an action upon such recognizance after forfeiture.

ERROR to the district court for Cass county. Tried below before POUND, J.

Crites & Ramsey, for plaintiff in error.

J. B. Strode, District Attorney, for defendant in error.

REESE, J.

This action was brought in the district court of Cass county upon the following instrument:

"THE STATE OF NEBRASKA, } ss.
".....COUNTY.

"Be it remembered, that on the 27th day of December, A.D. 1882, Wm. Greek and John King personally appeared before me, G. C. Cleghorn, one of the justices of the peace within and for the said county of Cass, and jointly and severally acknowledged themselves to owe the state of Nebraska the sum of two hundred and fifty dollars, to be levied of their goods, chattels, lands, and tenements, if default be made in the following condition, to-wit:

"The condition of this recognizance is such that if the above bounden William Greek shall personally be and appear before the district court of second judicial district of Nebraska, held within and for the county of Cass, on the first day of the term thereof next to be holden in and for the county aforesaid, then and there to answer a charge of grand larceny and abide the judgment of the court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

"WM. GREEK,

"JOHN KING.

"Taken and acknowledged before me on the day and year first above written.

"G. C. CLEGHORN,

"Justice of the Peace."

The indorsements upon the back of the instrument are as follows:

King v. State.

"BAIL BOND.

"The State of Nebraska }
v.
"Wm. Greek. }

"Filed this 27th of December, 1882,

"G. C. CLEGHORN,

"Justice of the Peace.

"I hereby certify on oath that I am worth over and above all debts and incumbrances and exemptions \$250.

"JOHN KING.

"Subscribed and sworn to before me this 27th day of December, A.D. 1882.

"G. C. CLEGHORN, J. P."

Upon the trial all the signatures to and endorsements upon this instrument were admitted to be genuine, but plaintiff in error objected to its introduction in evidence, and assigned the following grounds of objection (quoting from the record):

"It is a bond and not a recognizance. It is not a record, of any court. It is not entered on the docket of said justice of the peace. It is a loose piece of paper which was not entered on the said docket. It has never been certified to this court by said justice. It has never been entered on the appearance docket of this court with the date and amount thereof and the names of the sureties. That there is no such record. That the same is incompetent evidence."

These objections were overruled, and upon the exceptions of plaintiff in error being entered, he prosecutes error in this court, assigning said ruling for error.

The testimony shows that a criminal charge was made against the principal, Greek, and upon his being held to answer to the action of the next grand jury by the justice he, with his surety, King, plaintiff in error, entered into the obligation above quoted. It is also shown that a tran-

script of the docket of the justice of the peace was properly certified to the district court accompanied by the complaint, warrant, and recognizance, and the proper entries made upon the district court records, including the appearance docket.

The principal question here presented is, whether the instrument declared on is or is not a recognizance, and whether it has any binding force, it being taken upon a separate piece of paper by the justice and not copied into his docket, a simple recital being made therein showing the fact of the taking of the recognizance with the names of the surety. This question is an important one, for if it is not a valid recognizance the effect of so holding would be to render void nearly if not quite all of the recognizances taken by the inferior courts of the state, as it has been to some extent the practice, so far as we know, to use the blank and form used in this case. But while this is true, it is equally true that the judgment of the district court should not be upheld on that ground alone. Therefore, if the instrument sued on is not a recognizance under the statutes of this state and the decisions of the courts of the country, it is the duty of this court to so declare.

From a careful examination of the question here presented, we are led to the conclusion that the writing sued on is such a recognizance as is contemplated by our statute, and as such is valid. We do not hold that one taken in the form contended for by plaintiff in error would be void, but, upon the contrary, we think it would be good; but that question is not before us.

In Chitty's Criminal Law, 90, it is said: "A recognizance is an obligation of record entered into before a magistrate duly authorized for that purpose, with condition to appear at the sessions or assizes. The party need not sign this recognizance, but the record is afterwards made out on parchment, and is subscribed by the justice before whom it is taken."

Blackstone defines a recognizance to be, "An obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law, which is therein specified." 2d Black. Com., 341. See also 2 Bouv. Law Dic. (Recognizance).

In *State v. Crippen*, 1 O. S., 401, Bartley, Judge, says: "A recognizance is an obligation of record entered into before some court of record or magistrate duly authorized, conditioned for the performance of some particular act. It is equal in solemnity to and in some respects, at common law, takes priority over an ordinary bond. A recognizance differs from a bond in this: That while the latter, which is attested by the signature and seal of the obligor, creates a fresh or new obligation, the former is an acknowledgment of record of an already existing debt. * * *

To be a recognizance it is essential not only that the instrument be in writing, but also that it be a matter of record."

It then becomes necessary to inquire whether the recognizance in this case is of record. We are unable to find anything in the statutes of this state requiring a justice of the peace to enter a recognizance upon his docket. If such a provision does not exist then we should be content with the law as it is, as we have no authority to inject into a statute words which the law maker has omitted and which are not "understood" or clearly implied by the law. *State, ex rel. McBride, v. Long*, 17 Neb., 502.

Turning our attention to the statutes of this state upon the matter of recognizances, we find by reference to the law of examinations before magistrates the following provisions:

Section 298 of the Criminal Code provides in substance that, when for any reason it shall become necessary to adjourn a trial to another day, "the person accused may enter into a recognizance before the magistrate with good and sufficient security, to be approved by the magistrate, in

such amount as he shall deem reasonable, conditioned for the appearance of such person before such magistrate at a place and day and hour in said recognizance specified," etc.

By sec. 299, it is provided that, "If any person recognized agreeably to the last preceding section shall fail to appear at the time appointed, or shall otherwise fail to comply with the conditions of the recognizance, the magistrate shall declare the same forfeited, and transmit a transcript of his proceedings, together with the recognizance, to the clerk of the proper court," etc.

Another fundamental rule for the construction of statutes may be here invoked, and that is, in such construction all words and phrases should be given some use and meaning, if possible, consistent with the purposes of the act. This being true, we might well pause here and ask what meaning can be given to the words, "together with the recognizance," in the foregoing section, if the recognizance must be entered upon the docket of the justice? If it is entered upon the docket it would be included in the transcript sent to the clerk, and there would be no recognizance to send along.

Sec. 303 provides, if the magistrate finds that "an offense has been committed and there is probable cause to believe the prisoner guilty, the magistrate shall bind by recognizance such witnesses against the prisoner as he shall deem necessary, to appear and testify before the court having cognizance of the case.

Sec. 307 provides that, "If an offense for which the prisoner is held to answer be bailable, and the prisoner offers sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable," etc.

Sec. 306 is as follows: "It shall be the duty of every magistrate in criminal proceedings to keep a docket thereof as in civil cases. All recognizances taken under this title, together with a transcript of the proceedings where the

defendant is held to answer, shall be certified and returned forthwith to the clerk of the court at which the prisoner is to appear. The transcript shall contain an accurate bill of all the costs that have accrued and the items composing the same."

This section is directly applicable to the case at bar. By it we find not only that recognizances are not required to be written in the docket, but it is fairly implied that they shall not be. "All recognizances taken under this title, together with transcript of the proceedings (which evidently means a transcript of the docket) * * * shall be certified and returned," etc. Nothing can be plainer than that the transcript and the recognizance are contemplated here as in section 299 above referred to, as separate and distinct instruments.

As the word "recognizance," as used in the Criminal Code, must have substantially the same meaning wherever used, some additional light may be had by reference to its use in other parts of the code.

Sec. 324 provides for appeals to be taken by a defendant from a judgment of conviction rendered by a magistrate, and in this section the following occurs: "No appeal shall be granted or proceedings stayed unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance to the people of the state of Nebraska in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him. The magistrate from whose judgment the appeal is taken shall make return of the proceedings had before him, and shall certify the complaint and warrant, together with all recognizances, to the said district court on or before the first day of the next term thereof," etc.

This section, like those heretofore examined, clearly im-

plies a recognizance separate and distinct from the transcript of the proceedings as shown by the docket.

Sec. 383, which provides for the filing and record of recognizances, is as follows: "Whenever a transcript or recognizance shall be returned to the clerk it shall be his duty to enter the same upon the appearance docket of the court, together with the date of the filing of the transcript and recognizance, the date and amount of the recognizance, the names of the sureties, and the costs; whereupon the same shall be considered as of record in such court, and proceeded on by process issuing out of said court in the same manner as if such recognizance had been entered into before such court; and when any court having cognizance of a crime shall take a recognizance it shall be a sufficient record thereof on the journal of such court to enter upon the journal the title of the cause, the crime charged, the name of the party, and his sureties thereto, the amount of such recognizance, and the time therein required for the appearance of the accused; and the same shall be considered as of record in such court, but in making up the complete record in any case where one is required to be made, all recognizances, whether returned to or taken in such court, shall be recorded in full if required by the prosecuting attorney or the accused."

We have copied this section at length for two purposes, one of which we will notice hereafter; the other is to show that here as elsewhere the law-maker has kept up the distinction between the transcript and the recognizance. We find no warrant anywhere for saying that the recognizance when taken by a justice of the peace must be entered on his docket.

The recognizance in this case complies with the requirements of the common law without reference to our statutes. Suppose no signatures were appended to it we have every element of the common law recognizance. It has been held by this court that the signatures of the parties ac-

knowledging it cannot affect its validity. *Irwin v. The State*, 10 Neb., 329. We then have the certificate of the magistrate that the parties to it personally appeared before him and severally acknowledged themselves to owe the State of Nebraska the sum specified, to be levied of their goods, chattels, lands, and tenements, if default be made in the conditions named.

By some writers it is said that a recognizance differs from a bond in this: That while the latter, which is attested by the signature and seal of the obligors, creates a fresh or new obligation, the former is an acknowledgment on record of an already pre-existing debt. This formality is observed in the recognizance in the case at bar. They acknowledge that they owe, etc., thereby acknowledging a pre-existing debt. The instrument possesses all the requirements of the oldest and most technical common law recognizance, providing it is found to be an obligation of record.

Upon this branch of the case it becomes material to inquire what is meant by the words, "of record." We think this phrase had its origin in the customs of times somewhat ancient, when such recognizances were taken in what were termed courts of record, that is, having a seal; and that such recognizances being entered and recorded in these courts, they were said to be obligations of record; but it has been so modified and changed by statutes as to allow inferior tribunals to take recognizances, not as courts of record, but as magistrates, and when so taken and certified to the clerk of a court of record, and by him recorded, they become "of record" in this technical sense, and that is one of the purposes of section 383 of the Criminal Code, above quoted: "Whereupon the same shall be considered as of record in such court." This language is twice used in the section, evidently for the purpose of showing that where the recognizances were filed, recorded, etc., as required, they should be "of record" within the definitions above referred to.

Again, no objection is made to the form of this recognizance. It sufficiently appears "at what court the party * * * was bound to appear, and the court or officer before whom it was taken was authorized by law to require and take such recognizances." This, by section 388 of the Criminal Code, is all that is required, and it should be sufficient.

In *People v. Kane*, 4 Denio, 535, Beardsley, Judge, in writing the opinion, says: "The definition of a recognizance would seem to import that it is necessarily of record as soon as entered into, but strictly speaking this is incorrect, for a recognizance is not a record until duly enrolled and filed. This rule is universal, for no proceeding can be regarded as matter of record before it has been enrolled and filed in a court of record." Again he says: "And the same principle applies to recognizances taken by a court or magistrate for the appearance of a party charged with a criminal offense. The recognizance, although complete, is not in strictness a record until made out in form and filed with a court of record."

In *People v. Van Eps*, 4 Wend., 393, the action was upon a recognizance taken before the first judge of the common pleas court for the appearance of the recognizor at the next court of oyer and terminer. In discussing the subject of recognizances, Judge Sutherland, in writing the opinion of the court, said: "It does not, strictly speaking, become a recognizance or debt of record until it is filed or recorded in the court in which it is returnable." See also *State v. Walker*, 56 N. H., 176.

The People v. Huggins, 10 Wend., 464, was an action upon a recognizance taken before two justices of the peace for the appearance of the recognizor at the next court of general sessions of the county. Judge Sutherland, in writing the opinion, says: "It is undoubtedly necessary that it should appear that the recognizance was filed or made a record of in the court to which it is returnable."

King v. State.

The case of *Bridge v. Ford*, 4 Mass., 641, was an action on a recognizance taken before a justice of the peace, conditioned for the prosecution of an appeal to the court of common pleas. Chief Justice Parsons, in writing the opinion, says: "A recognizance does not appear to have been delivered to and entered of record in the common pleas. Debt as well as *scire facias* will lie on a recognizance to a party, but this recognizance must be matter of record and in debt upon it, the defendant may plead *nul tiel record*. Whenever, therefore, a justice recognizes a party to appear at any court of record, it his duty to transmit the recognizance to that court that it may be entered of record."

The State v. Smith, 2 Green, 62, was a *scire facias* upon a recognizance entered into before a justice of the peace for the appearance of the recognizor at the court of common pleas. It was held that it must appear that the recognizance had been legally taken and "returned to the court where the party recognizing is bound to appear, and such proceedings of that court as form the basis of the suit."

Commonwealth v. Emery, 2 Binney, 431, was an action upon a recognizance taken before an alderman of Philadelphia upon a separate piece of paper, in the following form :

<p>"Commonwealth v. "Stephen Austin and Eliza Burns.</p>	}	<p><i>Sur</i> charge, founded on oath of of George Reinholdt, that they have entered into a conspiracy with the intention of extorting money from him, etc.</p>
<p>"Stephen Austin in 2,000 drs. "Samuel Emery in 2,000 drs.</p>	}	<p>On condition that Stephen Austin be and appear at the next mayor's court to answer.</p>

"3 Nov., 1807..

"(Signed) S. AUSTIN.

"SAM'L EMERY."

This was introduced in evidence upon the trial, and objected to for the reason that "it was not a recognizance, but only a loose note, by which it did not appear that the defendant was bound to the commonwealth or bound at all, and that it was not signed by the alderman." Chief Justice Tilghman, in writing the opinion, said: "I should not be for confirming any illegal practices of justices of the peace, or any practice not expressly sanctioned by law which might be attended with dangerous consequences; but I see nothing illegal or dangerous in their practice of taking and certifying recognizances by short minutes, or in permitting those minutes to be given in evidence to juries as often as questions arise on the recognizances. Whether they contain sufficient substance will always be open to inquiry. I think the papers offered in evidence do substantially support the issue joined on the part of the commonwealth," etc.

This minute, it will be observed, was taken upon a separate piece of paper, signed by the recognizor, certified, and returned to the court of record as in the case at bar.

Lawton v. The State, 5 Texas, 270, was an action upon a bond taken as a recognizance. As it was made payable to the governor of the state instead of to the state, it was held void for that reason, but it was decided that "a bond taken by an officer of the court by authority of law and required to be returned into court, when so taken and placed upon the files of the court as an obligation of record, is in effect a recognizance, and will support the *scire facias*." It is said, in the opinion by Judge Wheeler, that "it has the force and effect of an obligation entered into before a court of record."

Kearns v. The State, 3 Blackf., 334, was an action upon a recognizance taken by the sheriff. It was signed by the conusor and his surety. On the trial it was contended, as in this case, that the obligation was a penal bond and not a recognizance. Judge Blackford, in the opinion, says:

"The obligation before us is in a certain penal sum conditioned for Kearn's appearance at court. The only objection against its being a recognizance is, that it is signed and sealed by the party. We do not conceive that the signature and seal can of themselves prevent this instrument from being a recognizance. To determine its character we have only to inquire whether it has been duly acknowledged before the proper officer. The sheriff, who is authorized to take the recognizance, certifies on the face of the obligation that it was signed and sealed in his presence and approved by him. This certificate settles the question. The obligation was duly acknowledged before the proper officer, and it cannot be a substantial objection to its character as a recognizance that the acknowledgment was made under the hand and seal of the party instead of being only verbally made. The instrument was in substance a valid recognizance."

Vierling v. The State, 33 Ind., 218, was where a defendant, who had been convicted of a misdemeanor before a justice of the peace, appealed from the judgment of conviction to the common pleas court; instead of entering into a recognizance in form as required by the statutes of that state he gave an appeal bond. In the common pleas court the prosecution, for that reason, moved to strike the case from the docket. The motion was sustained and the defendant appealed to the supreme court. It was held that the bond was a substantial compliance with the law, and that the common pleas court erred in striking the case from the docket.

The State v. Grippin, 1 O. S., 399, cited by plaintiff in error, was a case where the clerk of the common pleas court, instead of taking a recognizance as required by law, made a memorandum upon a loose sheet of paper as follows:

King v. State.

The State of Ohio
v.
Edwin Harvey,

Indictment for passing counterfeit coin. Defendant's recognizance in \$500, with Stephen Griffin and Thomas Harvey as sureties, conditioned for the appearance of defendant at the next term of this court to answer the above indictment. Done in open court, September 20, 1850.

G. S. TOMBLIN,
Deputy Clerk.

This was held not to be a recognizance either in form or in substance, and we think correctly. Chief Justice Bentley, in writing the opinion of the court, says: "To be a recognizance it is essential not only that the instrument be in writing, but also that it be a matter of record. If not actually entered upon the journal or record books, it must be upon the files of the court. * * * What does the writing offered in evidence on behalf of the plaintiffs in this case as a recognizance amount to? It is a brief memorandum of the clerk relating to the subject matter of a recognizance. It contains neither the form or substance of a recognizance in itself; neither the name of the cognizee nor any acknowledgment of any obligation, promise, or undertaking on the part of the cognizors is set out. Upon the principle, therefore, that a recognizance must contain and express in the body of it the material parts of the obligation and the condition, this paper can have no validity as a recognizance."

In *The State v. Dailey*, 14 Ohio, 91, the only questions involved were as to the effect of certain pleas presented by the defendants in an action on a recognizance taken by a justice of the peace for the appearance of the defendant at the common pleas court. The only question discussed which we think could have had any bearing upon this case is as to the conclusiveness of the recognizance. Chief Justice Wood, in writing the opinion of the court, uses the

following language: "If it be said the recognizance is the ministerial act of the justice only and not of record, the answer is, the statute requires it to be returned to the clerk of the common pleas. A memorandum of it, made *to be considered as record in that court* and sued by *process out of that court*, in the same manner as if taken then, and it therefore becomes a record in that court." (The italics are his.)

In this connection it might be proper to notice that the forms and precedents for recognizances given by Judge Swan in his excellent treatise on Practice in Justices Courts in Ohio, on page 882, *et seq.*, clearly contemplate that it shall be substantially as the one in this case (except the signatures), and there is no hint anywhere that it should be entered in the docket of the justice. Upon the contrary the form of the docket entry given, page 885, shows very clearly that he understood it to be unnecessary, the recital simply being: "I therefore order him to enter into recognizance in the sum of dollars for his appearance at court, which was done," etc.

We therefore conclude that the Ohio case cited does not support the conclusion of plaintiff in error, but in the main supports the views here expressed.

As giving some information as to the practice in Ohio of justices of the peace, we observe in Wilson's Ohio Criminal Law, at page 326, the form to be adopted where a recognizance to appear on a day to which the examination is adjourned is forfeited: "The same to be written on the back of the recognizance, and a minute made of it upon the docket." The Ohio Criminal Code being similar to ours, this may be considered as indicating the practice in that state.

We therefore conclude that the recognizance declared on in this case is such an one as is contemplated by the Criminal Code of Nebraska, and that it is a valid recognizance. It follows, therefore, that the court did not err in overruling the objection to the admission of the recognizance in evidence.

It is next insisted that the surety was exonerated by operation of law by the imprisonment of Greek on a charge of felony in the state of Arkansas. The answer alleges and the proof tends to show that after the execution of the recognizance Greek went to the state of Arkansas, was there arrested upon a charge similar to the one for the commission of which he was arrested in this state, and upon trial was convicted and sentenced to the penitentiary, he being under arrest at the time of the forfeiture of the recognizance mentioned in the petition of the defendant in error. If the fact is as alleged and claimed by plaintiff in error, it is clear that the commission of the crime for which he was arrested in Arkansas was subsequent to the execution of the recognizance, and was of course the voluntary act of the accused.

It is not deemed necessary to enter into a discussion of the cases cited by plaintiff in error by which under certain instances it has been held that the surety was discharged. It is sufficient to say that it is no bar to a prosecution of this kind, and it cannot be plead as a defense, that the accused voluntarily left the state, violated the laws of the state to which he went, and for such violation was imprisoned. *State v. Scott*, 20 Iowa, 63. *Hartington v. Dennie*, 13 Mass., 92. *Taylor v. Taintor*, 16 Wal., 366.

It is insisted that the complaint upon which the warrant was issued under which Greek was arrested was defective and charged no offense, and that the order of the justice of the peace holding Greek for his appearance at the next term of court did not comply with the statutes, he failing to find that there was probable cause for believing Greek guilty of the crime charged. As to the first question, although the complaint was informal and inartistically drawn, yet it sufficiently charges the commission of an offense; but whether it does or not cannot be inquired into in this proceeding.

In *United States v. Evans et al.*, 2 Federal Reporter,

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147, it was held that a fatal defect of an indictment was no defense to an action upon a recognizance given to answer a charge. The court says: "He was bound to appear to answer the charge, whether upon this indictment or some other indictment or information to be preferred against him. His appearance at court was the thing to be secured, and the further condition was that he should continue in attendance until discharged by the court. He cannot abscond, forfeit his bond, and on the *scire facias* try collaterally the merits of the case upon the sufficiency of the indictment or other matter of defense. The defendant and his sureties would by such practice be allowed to judge of the propriety and utility of his appearance, which cannot be permitted."

The same may be said as to the second proposition. By reference to the transcript of the justice, introduced in evidence, we find after the introduction of the testimony the following recital: "On consideration whereof I find that there is probable cause to believe that Adam Ingram committed the offense charged in the complaint, and that William Greek was knowing to the fact, or partially implicated therein. Adam Ingram is therefore required by me to enter into recognizance of good and sufficient surety in the sum of \$500, and William Greek in the sum of \$250, for their appearance before the district court of Cass county on the first day of the next term thereof, to answer said complaint. Whereupon Adam Ingram entered into a recognizance of \$500 with James Ingram as surety, who is approved by me, and William Greek entered into recognizance of \$250 with John King as surety, who is approved by me upon his oath thereto as to his property liability."

This is sufficient when collaterally assailed.

It follows that the decision of the district court is correct, and the same is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

H. C. PAULMAN, PLAINTIFF AND APPELLEE, V. PRENTISS D. CHENEY, DEFENDANT AND APPELLANT.

1. **Specific Performance: WAIVER.** Where there are conditions in a contract for the sale of real estate, making time the essence of the contract and providing for a forfeiture in case of default, an acceptance of part payment on the contract is a waiver of the condition as to all defaults then existing.
2. ———: **DECREE SUSTAINED.** Where a contract provided that upon the payment of one-half of the purchase money the vendor should execute a deed to the purchaser, and take a mortgage upon the land conveyed, to secure the unpaid purchase money, *Held*, That a decree that the vendee pay the entire purchase price at the time of the execution of the deed would not be set aside on behalf of the *vendor*, unless there are special reasons why he should not receive the money.

APPEAL from Johnson county. Heard below before BROADY, J.

L. W. Colby, for appellant, cited: *Morgan v. Bergen*, 3 Neb., 214. *Reynolds v. B. & M. R. R. Co.*, 11 Id., 186. *Lent v. Same*, Id., 203.

S. P. Davidson, for appellee, cited: *Laird v. Smith*, 44 New York, 618. *Hull v. Sturtevant*, 46 Maine, 34. *Bass v. Gilliland*, 5 Ala., 76. *King v. Ruckman*, 24 N. J. Equity, 356. *Guin v. Roath*, 37 Conn., 16. *Richmond v. Robinson*, 12 Mich., 200.

MAXWELL, J.

This an action to enforce specific performance of a contract for the sale of seventy-five acres of land off the south end of section 1 in township 5 north, range 10 east, which is described in the contract and petition by metes and bounds. The contract was entered into on the 29th day of March, 1879, by which the defendant sold to the plain-

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tiff the land above described, for the sum of \$750, \$100 of which was paid at the date of the contract, the balance to be paid in ten annual payments at the times specified in twenty promissory notes then given. The notes were payable at the office of Russell & Holmes, Tecumseh, Neb., without interest before due, and with ten per cent per annum after maturity. The defendant was to pay the taxes on said land for the year 1879 and previous years, and the plaintiff to pay the taxes of 1880 and subsequent years. The contract is substantially in the same form as in *Robinson v. Cheney*, 17 Neb., 673, and the construction placed upon it, in that case, will be adhered to in this.

It appears from the evidence that the notes due March 29th, 1881, from the plaintiff to the defendant, were not paid until April 23d of that year; that the notes due March 29th, 1882, were not paid until May 5th, 1884. At this time the notes due March 29th, 1883, and March 29th, 1884, were unpaid. All the money so paid was accepted by the defendant. On the 17th of June, 1884, and without any further default being made by the plaintiff in his payments, the defendant returned all the notes to the plaintiff in a registered letter, and declared the contract forfeited. On the 30th of that month the plaintiff deposited the entire amount of the unpaid purchase money in the bank of Russell & Holmes, and demanded a deed of the defendant, which not being given, the plaintiff brought this action. The answer is a general denial. The court below found the issues in favor of the plaintiff and entered a decree enforcing the contract.

The only question that need be considered in this case is that of waiver.

In *Dumpor's Case*, 2 Coke, 119, it was held that a condition in a lease that the lessee or his assigns shall not alien without the special license of the lessor, is determined by an alienation by license, and no subsequent alienation is a breach of the condition, nor does it give a right of entry

to the lessor. The courts of this country have generally held that a waiver by acceptance of rent or the like is a waiver of the existing forfeiture, but leaves the condition effectual for the future, and the same rule seems now to prevail by statute in England. The common law put a rigorous interpretation upon all contracts, and held that unless the conditions thereof were performed at the time and in the manner therein set forth, the breach was complete and no subsequent performance possible. But even at common law the rule as stated by Coke was, that where "it appeareth that if the condition be broken for non-payment of rent, yet if the feoffer bringeth an assize for the rent due at that time, he shall never enter for the condition broken, because he affirmeth the rent to have a continuance, and thereby waiveth the condition," etc. Coke Lit., 211*b*. The distinction made in some of the cases—that to make a receipt of rent a waiver the rent must have accrued after the breach, *Jackson v. Allen*, 3 Cowen, 220, need not be considered, and it could not apply to this case. Here was a contract with conditions of forfeiture. The conditions, in no instance, so far as the payment of the purchase money was concerned, seem to have been strictly complied with, yet the defendant treated the contract as valid and continuing. The money received by him on May 5th, 1884, was paid under the contract and accepted by him as such. He then recognized the contract as then existing under which the plaintiff upon payment of the purchase price was entitled to a deed. This, therefore, was a waiver of the prior conditions of forfeiture; and the defendant could not by a mere return of the notes to the purchaser, where there had been no subsequent default, terminate the contract and deprive the plaintiff of the land. Whether he could have done so by a notice to pay the money in a reasonable time is not before the court. The defendant contends that he cannot be compelled to accept the amount of money due on the contract in place of a

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mortgage, as provided in the contract. This is true, and if an issue had been made upon that question it is possible that the court would have directed the execution of a mortgage. But the answer is a mere denial. We think the court was justified, from the conduct of the plaintiff, in believing that the purchase money for the land was at least of equal value to him as a mortgage on the land. There was therefore no error in decreeing its payment. In conclusion, as was said in *Robinson v. Cheney*, a court of equity will not declare a forfeiture unless compelled to do so. It violates every principle of justice to take the property of one man and give it to another without compensation upon a simple failure to pay at the day, where there has not been gross laches. While in particular cases such forfeitures will be sustained, yet they will be denied in all cases where the vendor has directly or indirectly waived the condition on which they depend. As the defendant waived the condition in this case it was his duty to accept the balance of the purchase money and execute a deed to the plaintiff, and having failed to do so, the decree of the court below enforcing the contract is right, and is affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

MARIA A. TATRO, APPELLANT, v. JOSEPH TATRO, APPELLEE. | 18 395
57 123

1. **Divorce:** DOWER OF WIFE. Under section 23 of Chap. 25, Comp. St., entitled "Divorce and Alimony," a wife, upon obtaining a divorce for the cause of misconduct, etc., of the husband, is entitled to dower in his lands in the same manner as if he were dead.

2. ———: ———. If she make no demand for dower, and the court in making a division of the property of the husband, in the nature of permanent alimony, awards a sum in gross to her, it will be deemed to include all her interest in the husband's estate, and will bar her claim for dower, unless a contrary intent is shown in the decree.
3. ———: DECREE: ALIMONY. Upon a divorce being granted, a decree in favor of the wife for permanent alimony will bar her right to any further claims against the estate of the husband.

APPEAL from Fillmore county. Heard below before MORRIS, J.

John P. Maule, for appellant.

J. W. Eller and *F. I. Foss*, for appellee.

MAXWELL, J.

This action was brought by the plaintiff against the defendant in the district court of Fillmore county to obtain a divorce, upon the grounds of cruelty and failure to provide a suitable maintenance. The cause was referred to a referee, who made a report in favor of the plaintiff. The report was confirmed and a decree of divorce rendered, with permanent alimony to the amount of \$2,000, to be paid by installments. The defendant appealed to this court. The plaintiff also appealed from the decree for alimony. Before the hearing the defendant died, and the cause so far as it relates to alimony was revived. It is claimed on behalf of the plaintiff that the decree for alimony is not for a sufficient amount, and also that she is entitled to dower in the estate of the defendant; while on behalf of the defendant's estate it is alleged that the amount of alimony is excessive, and if, in addition to it, the plaintiff is entitled to dower in the estate, it will be impossible to raise the amount without her signature to the deeds, the property being exclusively real estate. A considerable amount of temporary alimony was

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allowed the plaintiff and her attorneys during the pendency of the action, while the costs and expenses of the trial amount to a very large sum. The defendant's property consists entirely of real estate, which, as is well known, is liable to fluctuate in value, according as the demand may be brisk or dull. He is shown to have been in debt to a considerable amount, and after deducting the debts the alimony allowed is about equal to one-third the value of the estate; and therefore the court did not err in awarding the same. But it is claimed that notwithstanding the decree of divorce the plaintiff is still entitled under the statute to dower in the real estate of the defendant, and this is the principal question in the case. This is claimed under section 23 of chapter 25, Comp. Statutes of 1885, which is as follows: "When the marriage shall be dissolved by the husband being sentenced to imprisonment for life, and when a divorce shall be decreed for the cause of adultery committed by the husband, or misconduct or drunkenness of the husband, or on account of his being sentenced to imprisonment for a term of three years or more, the wife shall be entitled to dower in his lands in the same manner as if he were dead, but she shall not be entitled to dower in any other case of divorce."

Under a somewhat similar statute the court of appeals of New York held, in *Wait v. Wait*, 4 Comst., 95, that a divorce for adultery was prospective in its operation, and had no other effect on the marriage relation than such as was declared by statute, and hence that such divorce did not deprive the wife of her right of dower. *Burr v. Burr*, 10 Paige, 25-26. Under the New York statute, however, the defendant found guilty of adultery was prohibited from marrying again during the life-time of the plaintiff. 2 R. S., 146, § 49. This rule seems to have been extended by the courts to other cases of misconduct of the husband.

In this state an absolute decree of divorce, if unappealed from, is final as to the rights of the parties. Our statute

neither authorizes nor sanctions the practice of divorcing the plaintiff, and denying a divorce to the defendant. A decree *a vinculo matrimonii* dissolves the marriage and puts an end to the relation of husband and wife, and as a necessary consequence to the right of dower, upon the decease of the husband.

Dower in this state is only allowed to the widow who was the wife of the person dying at the time of his death. Kent says that the next species of life estates created by the act of the law is dower. It exists where a man is seized of an estate of inheritance, and dies in the life-time of his wife. 4 Kent Com., 35. Coke Litt., 30a. 2 Blacks. Com., 130. The effect of a divorce is to put an end to all rights of property depending upon the marriage, and not actually vested, such as the right of dower in the wife, etc. *Rice v. Lumley*, 10 O. S., 596. *Billan v. Hercklebrath*, 23 Ind., 71. *Given v. Marr*, 27 Me., 212. *Barbour v. Barbour*, 46 Id., 9. *Whitsell v. Mills*, 6 Ind., 229. *Burdick v. Briggs*, 11 Wis., 136. *Miltimore v. Miltimore*, 40 Penn. St., 151. *Stilphen v. Houdlette*, 60 Me., 447. It is presumed that the court in rendering a decree of divorce will award alimony in proportion to the property of the defendant. This must include all claims of the plaintiff upon the property of the defendant. If either party is dissatisfied with the decree the case may be brought into this court for review; but the final decree is conclusive upon the rights of the parties, and bars the rights of either party to any further claim upon the property of the other. The most that can be claimed for our statute is, that upon the decree of divorce being rendered for any of the causes above named the court may in the nature of alimony award the plaintiff dower in the lands of which her husband was seized at the date of the decree. In such case, however, the right to dower is not contingent upon the death of the husband, but accrues at once upon the rendition of the decree. Thus, in *Smith v. Smith*, 18

Mass., 230, upon a divorce *a vinculo* for the adultery of the husband, it was held that the wife was entitled to dower in the same manner as if the husband were dead, and the same ruling was had in *Merrill v. Shattuck*, 55 Me., 370. *Harding v. Alden*, 9 Id., 140. *Davol v. Howland*, 14 Mass., 219. The question of alimony does not seem to have been considered in these cases. At common law the relation of husband and wife must continue to exist to entitle the wife to alimony, and upon a decree of divorce *a vinculo* or sentence of nullity no alimony could be awarded. The statute, however, to protect the claims of the wife, preserves her right of dower in the lands of her husband in case she obtain a decree of divorce *a vinculo* from him for adultery, misconduct, etc. This right becomes operative at once upon a decree being rendered, and not upon the death of the defendant. It is evident, however, that the object of the statute is to enable the wife to obtain a fair division of the property of her husband, and to prevent the defendant from conveying his real estate in fraud of her rights. A married woman may bar her dower by joining in a deed of conveyance of the estate or by a separate deed. She may also be barred by a jointure settled on her with her consent before marriage, or by a pecuniary provision in lieu of dower, to which she has assented. She may also elect between her right to dower under the statute and a provision in the will of her husband, but she will not be entitled to claim under both unless that appears to have been the intention. Comp. St., Ch. 23, § 12, *et seq.* Where the wife accepts any of the pecuniary provisions named, in lieu of dower, she will be barred thereby. So, if upon rendering a decree of divorce the court in decreeing property to the wife in the nature of permanent alimony awards a gross sum, it will be held to include all the property of the husband, including the right of dower, to which the wife will be entitled. It is a fundamental principle of equity jurisprudence that where all parties in in-

terest are before the court in a case where its jurisdiction is established, it will determine the entire controversy, and award full and final relief. This principle has frequently been applied to causes of action which were purely legal in their nature, and where relief could have been granted by a court of law, and particularly is this true under the code, where the distinctions between actions at law and suits in equity are abolished. *Laub v. Buckmiller*, 17 N. Y., 620. *Lattin v. McCarty*, 41 Id., 107. *Davis v. Lambertson*, 56 Barb., 480. *Sternberger v. McGovern*, 56 N. Y., 12. Story's Eq. Juris., §§ 64, 65. *Turner v. Pierce*, 34 Wis., 658. *McNeady v. Hyde*, 47 Cal., 481. The object is to prevent a multiplicity of suits. A court of equity, therefore, in awarding permanent alimony to the wife, must take into consideration all the circumstances, and decree such an amount to the wife as may seem just and proper. But the decree will be final, unless appealed from, and will determine the rights of the parties to the property in controversy. Where a decree of divorce is granted which is not sought to be reviewed on error or appeal, the parties after the lapse of six months may marry again; and the only purpose of this provision of the statute is to enable either party if aggrieved by the decree to have the cause reviewed in the supreme court. Comp. Stat. 1885, Ch. 25, § 45. Aside from this restriction it is not the policy of our law to impose restrictions upon the marriage of either of the parties. We therefore hold that a wife, on obtaining a divorce for the causes named, is entitled to dower in the lands of her husband if she so elect, and the same may be set off as a portion of the husband's estate to which she is entitled. But that if she do not demand her dower, and the court makes a division of the property of the husband in her favor in the nature of alimony, it will be held to include her dower right unless a contrary intention appears, and the decree will conclude the rights of the parties. As the decree for alimony in this case was for

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a gross sum payable by installments, and seems to have been a fair division of the property of the husband; it must be held to include the plaintiff's right of dower in his lands. The decree of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

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FRANK JONES, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: PROSECUTION BY INFORMATION.** The act "to provide for prosecuting offenses on information and to dispense with the calling of grand juries, except by order of the district judges," which took effect June 10, 1885, applies to all cases where grand juries were required after the act took effect.
2. ———: **GRAND JURY NOT SUMMONED UNLESS JUDGE DIRECT.** The proceedings by information are exclusive, unless the judge, in a written order filed with the clerk of the court, shall require a grand jury, in which case it shall be drawn in the manner provided by law.
3. ———: ———. The authority to require a jury to be summoned from the bystanders is repealed by implication.

ERROR to the district court for Cuming county. Tried below before CRAWFORD, J.

Wilbur F. Bryant, for plaintiff in error.

William Leese, Attorney General, *Guy R. Wilbur*, District Attorney, and *T. M. Franse*, for defendant in error.

MAXWELL, J.

The plaintiff in error was convicted in the district court of Cuming county of shooting at another person with intent to kill, and was sentenced to imprisonment in the penitentiary for eight years. He now prosecutes error to this

of court what persons are charged with crime and the necessity, if any exists, for calling a grand jury. The legislature evidently supposed that ordinarily such jury would be unnecessary, and the power to call a grand jury was reserved to the judge, to be exercised by him only when in his opinion the demands of public justice required it. He must determine the necessity; but when in his opinion a jury is necessary, the statute has pointed out the procedure to be followed, viz., an order in "writing under his hand and filed with the clerk of the court." This is to be filed with the clerk "at least ten days before the first day of the session of the district court," and a jury will then be drawn from the receptacle, in which the names of sixty persons, selected for jurors by the county board, are kept. It will be observed that under the former statute the names of grand jurors were drawn before those of the petit jurors, while under our present law the names of the petit jurors are first drawn. This court, from its earliest organization, has required grand juries to be drawn in the manner provided by law. Thus, in *Burley v. The State*, 1 Neb., 397, it is said: "The grand jury must be selected in the manner prescribed by the law. There is no security to the citizen but in a rigid adherence to the legislative will as expressed in the statutes made for our guidance." This case was cited with approval in *Preuit v. The People*, 5 Neb., 377. *McElvoy v. The State*, 9 Neb., 158. *Clark v. Saline Co., Id.*, 516. *Priest v. The State*, 10 Neb., 393. And was followed in *Bohanan v. The State*, 15 Neb., 209, and some other cases, without being cited, and is the settled law of this state. The importance of securing fair-minded, impartial, intelligent men for jurors, who, without feeling or bias, will weigh the evidence and be governed by it alone, cannot be overestimated. To secure such jurors the statute requires the names of electors to be selected in due proportion from all parts of the county. Under the former statute, where after a grand jury was discharged

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it became necessary to summon another, the court could order it summoned from the bystanders. This power, perhaps, was necessary to prevent a failure in the administration of the law in some cases; but under the present statute this power is unnecessary, and the statute is repealed by implication. The court, therefore, had no power to order a grand jury summoned from the bystanders, and as proper objections were made to the jury by a plea in abatement, the jury should have been discharged. The indictment, therefore, is invalid, and must be quashed. The judgment of the district court is reversed, the indictment quashed, and the plaintiff in error remanded to the proper authorities of Cuming county to be dealt with according to law.

REVERSED AND REMANDED.

THE other judges concur.

HENRY PARRISH, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **MURDER: EVIDENCE TENDING TO LOWER GRADE OF HOMICIDE SHOULD BE SUBMITTED TO JURY.** Upon a trial for murder an instruction to the jury which takes from their consideration, or which is susceptible of being understood by the jury to take from their consideration, certain evidence in the case tending to lower the grade of the homicide to manslaughter is erroneous, and in such case, the verdict being a general one and the sentence being for fifteen years in the penitentiary, the judgment will be reversed.
2. ———: **VERDICT: SENTENCE.** In a trial for murder a verdict of guilty which does not ascertain whether it be murder or manslaughter, as required by section 489 of the Criminal Code, confers no power on the court to pass sentence on the accused.

REHEARING of case 14 Neb., 60.

T. Appleget & Son, for plaintiff in error.

William Leese, Attorney General, for the State.

COBB, CH. J.

The plaintiff in error, together with five others, was, at the September term, 1880, of the district court of Johnson county, indicted for the murder of one Elmer E. Parker. The indictment was for murder "without deliberation and premeditation," and accordingly charged the crime of murder only in the second degree.

It appears from the supplemental record filed in this court, in pursuance to an order of the court made at the January term, 1885, that at the said September term of said district court, 1880, the plaintiff in error was placed upon his separate trial, tried, convicted, and sentenced to a term of fifteen years at hard labor in the penitentiary. Within the next ensuing year the cause was brought to this court on error. The cause was submitted to the court at the next term upon argument and brief of counsel for plaintiff in error, but went over to the next term to enable the attorney general to present a brief on the part of the state. When such brief was finally presented it called attention to the fact that the record contained no copy of either the indictment or the verdict. Yet this omission was not supplied and the opinion of the court was finally reached, affirming the judgment. The opinion is published in Vol. 14 of our reports, at pp. 60-67.

A motion for a rehearing was made and rehearing granted at the last term (Jan., 1885).

The ninth instruction given by the court on the part of the state was in the following words: "9. The jury are further instructed that if you should find from the evidence that Henry Parrish, the defendant, did kill and slay Elmer E. Parker, and no explanatory circumstances are

proven, the presumption of the law is that there was malice and that the crime is murder in the second degree."

Of this instruction the court in the opinion say: "The 9th instruction given on behalf of the prosecution was not strictly applicable, as there were explanatory circumstances respecting the killing before the jury, and had the conviction been of murder in the second degree it is possible that the giving of it would have been cause for a new trial. The error of this instruction was in its suggestion of the possible want of any circumstances, when in fact there were many of them as would lower the homicide to the grade of manslaughter. But the conviction being of manslaughter only, the error was not prejudicial and there was no cause for reversing the judgment."

It thus appears that it entirely escaped the attention of the court that the conviction of Parrish was understood and construed by the district court to be for murder in the second degree. Had reference been made to the sentence in this connection it would have been seen that the term of imprisonment imposed upon the plaintiff in error exceeded the maximum provided by law for manslaughter by five years. Section 5 of the Criminal Code provides as follows:

"Sec. 5. If any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter, and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year."

Upon the trial there were sworn and examined on the part of the state, besides the expert witnesses and the sheriff, sixteen witnesses, fourteen men and two women, all of whom had about equal opportunities of seeing and testifying to the fact and circumstances attending the homicide. It is quite within bounds to say that scarcely two

of them agree in the essential facts of the case. I transcribe the material part of the testimony of A. C. Cox, one of the said witnesses on the part of the state, given on his direct examination, as being the strongest evidence against the accused, and as illustrating the remarks of the court in that part of the opinion above quoted as "circumstances" "as would lower the homicide to the grade of manslaughter."

A. C. Cox called and sworn for the state:

Q. How long have you lived in Tecumseh?

A. It has been about fifteen years.

Q. Where were you on the 25th of June, 1880?

A. Out on the mail route during the day.

Q. What time did you get in town?

A. I don't know the exact time. I got here only by my regular time from about half-past four to five o'clock. I think about half-past four o'clock.

Q. State what you saw soon after you got back, in connection with Parker and his son?

A. The first thing I noticed of Parker he was sitting over in front of the Arcade saloon, or near there, on some rock; his son was standing near him, not far from him.

Q. Which building was that, what street was it on?

A. I cannot tell you the streets.

Q. On the west of South street?

A. It is over—

Q. How far from Blume's new building?

A. It is the one I believe that Dewey has, it was the next door from—I don't know; he was over near there.

Q. State what occurred there?

A. I saw nothing in connection that I know of, between Parker and the boy there. Then I saw a man come across the street and commence talking to Parker.

Q. Who commenced the conversation?

A. Blume.

Q. What did he say?

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A. I did not hear the first words he used; I did not hear what they were, but I heard Parker tell him to go away and let him be. Then I heard Blume call him "a damned son of a bitch."

Q. Who was then with Blume, if anyone?

A. With Blume at that time?

Q. Yes.

A. I cannot say anyone was with him just then.

Q. Who was near him?

A. The crowd was gathering up all the time.

Q. Which way did Parker go?

A. Parker struck at Blume a lick with a cane, a walking cane, a heavy stick, and struck at him a very heavy lick, and Blume dodged it and ran into the saloon; the boy stepped up just before the lick was struck and said he wanted them to go away and let his father be; he came to take him home. Then this Blume called him this name, and Parker struck at him. Then I saw another man come rushing around, and the boy picked up a brickbat; I think one in each hand. There was another man came rushing round and had some words with the boy. I did not notice what Parker was doing, because I was noticing what the young man was doing.

Q. Where did they go from there?

A. They worked their way towards the Sherman House.

Q. Where did they go from there?

A. From there they worked towards the depot.

Q. Where was the crowd all this time?

A. The crowd was following them up tolerably close.

Q. Who do you mean by them?

A. I mean the crowd following Parker and his boy.

Q. And they were going which way?

A. They started east from where they first commenced, they started east toward the Sherman House and from there towards the depot, going backwards—Parker and the boy—until they got to the Sherman House, and then

the boy turned around. Parker had told him repeatedly to go home.

Q. What did the boy say to the old man?

A. The boy said to the old man—I started before them and got to the Sherman House as they first started—he said, “Father, let me alone, I can whip him.” The old man said, “Elmer, I tell you to go home,” and kept pushing him, for him to go home.

Q. Whereabouts did this last conversation occur?

A. What conversation do you mean?

Q. The last one, the last one you speak of between the old man and the boy.

A. When they first left the corner of the building going towards the Sherman House.

Q. Who of the crowd did you see or notice following after these parties?

A. Well, sir, I don’t know as I could name them at this time. I saw Parrish near Parker, and I seen Mr. Hill; I don’t know his given name, and I saw one man by the name of Jerry; I don’t know his other name, and a good many other men, I don’t recollect. May be more I could think of presently, but don’t know now.

Q. State to the jury what Parrish was doing.

A. Parrish, from what I could see, was trying his best to get at the boy.

Q. What was he saying to the boy, and what was he doing?

A. Parrish, when I noticed him first, came up when Blume ran into the saloon, and picked up a brick and was trying to get at the boy; when I seen the boy pick up a brick, Parrish was saying something in a loud tone of voice, and I don’t know whether I remember what he was saying. He was using some hard words, but I don’t remember what they were.

Q. Against whom was he using the words?

A. The boy.

Q. Can you state the words?

A. I don't think I can at this time, I might at that time.

Q. State what further was done.

A. I noticed every time Parrish would work his way around the crowd the old gentleman Parker was waving his cane, telling them he would kill the first man that laid a hand on the boy's head; telling them to keep back. I heard another man—that is all I remember of Parrish trying to get at the boy.

Q. What other man?

A. I heard another man halloo for him to go ahead and whip him and he would pay the fine.

Q. Who was that man?

A. Lee Woodruff.

Q. State what further occurred.

A. I noticed the boy then going backwards towards the Sherman House, and the old gentleman talking to the crowd, and finally the old gentleman looked over his shoulder and said, "Elmer, I tell you to go home," and then the boy walked very deliberately towards the depot.

Q. Where was Parrish at this time?

A. I could not say; he was first here and then there in the crowd.

Q. Who was in advance of the crowd?

A. As near as I recollect Parrish and this young man Hill, the first time, when the boy first started, and Jerry, I think, and I don't recollect who was in advance of the crowd; I recollect I was there myself a portion of the time, a good deal of the time.

Q. State what further you saw.

A. I noticed when the boy started on down the old gentleman kept going on, and when we got just below the Sherman House I heard Jerry, from just off the sidewalk below the Sherman House and on the street, say that "it was a damned shame for a mob like that to pitch on an old

man and a boy." Henry Parrish came rushing round to where Jerry was and made as though he was going to take hold of him, and he says to Jerry, "What have you got to do with this, and do you want to take the old man's part?" He remarked again it was a shame to pitch on an old man and a boy. Jerry was whittling, or had been. Parrish cracked his hands together and said, "Put up that knife and I will whip you." Jerry remarked, "I will put up no knife, and you take damned good care not to run against that knife." My attention was attracted to that, and I did not see Parker at that time.

Q. What was the next thing you noticed in connection with this?

A. The next thing I noticed a man came rushing into that crowd and grabbed Parrish by the arm, and said, "They have got him now," or something to that effect.

Q. Whom did they have reference to?

A. I judged they had reference to Parker.

Q. State what next you noticed.

A. At that time I whirled to look down that way as soon as I could, and I saw a man just coming up on the sidewalk like as though he was coming across the street, at least he came in that direction, was in the act of getting on the sidewalk.

Q. State what else occurred.

A. At that the crowd started, when this man came into the crowd and called the attention of myself and others turned to look, and Parrish at once tore himself out of the crowd and run down to where these men were, this man I first noticed run up and struck Parker.

Q. Struck Parker?

A. Yes, sir.

Q. What was the young man doing then?

A. Young Parker?

Q. Yes.

A. He was further down the sidewalk towards the depot at that time, on ahead of Mr. Parker.

Q. What did you further in connection with him?

A. With him?

Q. The young man.

A. I saw him after they commenced pounding the old man. I saw him come running back up the sidewalk.

Q. What else occurred?

A. I saw a man hit him.

Q. State all about it?

A. I saw Blume hit Parker in the back of the head. There was another man struck Parker a lick, and then Parrish was there at that moment and hit him another lick.

Q. That was the old man?

A. Yes, sir.

Q. What was the young man doing?

A. The young man? As Parrish struck the old man the young man started and run back up the sidewalk, as Parrish struck the old man, he turned partly round and struck the young man a lick, knocking him down towards the sidewalk.

Q. What else did you see?

A. I noticed the young man throw a brick at Parrish.

Q. What else did Parrish do?

A. I saw Parrish stoop towards the sidewalk, and as he looked down to the sidewalk he made a spring towards the old gentleman, and as he did so, he reached to the sidewalk.

Q. What did he do then?

A. He picked a rock from the sidewalk and threw it at the boy.

Q. What did the rock do?

A. The rock hit the boy on the head and the boy fell down.

Q. What sized rock was it?

A. I cannot say.

Q. Would you know the rock if you saw it?

A. I think I would, sir.

Q. (Handing witness rock.) Is that the rock?

A. (Examining rock.) That looks very much like the rock, but in my mind I was thinking it was a little heavier, probably that may be the rock.

Q. How far were you from Parrish at the time he threw the rock?

A. I don't know the exact distance, but I would say somewhere—probably eight or ten feet, I don't know just exactly—probably not so far. I was standing by the fence holding to a board. I don't recollect how far they were from the corner.

* * * * *

An examination of the foregoing testimony, in connection with the instruction above quoted, cannot fail to show the inapplicability of the instruction to the facts of the case, nor that the jury in following the same may have rejected all of the accompanying or explanatory circumstances. And while it is no part of my purpose to say that the evidence in the case is not sufficient to support a finding for murder in the second degree, I do say that upon the whole evidence in the case the jury would have been justified in returning a verdict for manslaughter. And when the verdict upon such evidence, as in the case at bar, is a general one, although found on an indictment for murder in the second degree, it is doing no violence to presume that the jury intended by the same to find the lowest grade of homicide included in the charge of the indictment. The following is a copy of the verdict:

“State of Nebraska, plaintiff, v. Henry Parrish, defendant. We the jury in this case being duly impaneled and sworn do find and say that the said defendant Henry Parrish is guilty as he stands charged.

“ROBERT BRYSON,
“Foreman.”

Section 489 of the Criminal Code provides, "That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict, whether it be murder in the first or second degree or manslaughter; and if such person be convicted by confession, in open court, the court shall proceed by examination of witnesses in open court to determine the degree of the crime, and shall pronounce sentence accordingly."

This section of our statute was borrowed literally from the statutes of Ohio, p. 275, § 39, Swan's Rev. Stat. And before the settlement of this state the latter statute had received an interpretation by the courts of Ohio. In the case of *Dick v. The State of Ohio*, 3 O. S. R., 89, the court, in the opinion, say: "The true object of this statutory provision is apparent. As an indictment for murder in the first degree embraces each of the three degrees of criminal homicide, of either of which the accused may be convicted, and as the issue which the jury is sworn to try, involves a charge of each of these three crimes on a general verdict of guilty, which does not ascertain the degree of the homicide, the court could render no valid judgment, not knowing from the verdict for what degree of crime the judgment should be rendered." * * * "The supreme court of Ohio held on the circuit in the case of *The State v. Town*, Wright's Rep., 75, that if the jury, in case of a trial for murder, do not specify in their verdict whether they find the accused guilty of murder in the first or second degree, or manslaughter, the court will refuse to pass sentence, and award a new trial even without a motion on the part of the defendant. And this, I believe, has been in accordance with the uniform practice in this state."

The above case has been followed by the later ones of *Parks v. The State*, Id., 101. *Robbins v. The State*, 8 O. S. R., 131. *Schoonover v. The State*, 17 O. S. R., 299, and others. See also *People v. Baza*, 53 Cal., 690. *State v. Redman*, 17 Iowa, 329.

State v. Stevenson.

The language of the statute is mandatory and controls all trials for murder of any degree. Without its observance the verdict confers no power on the court to pass sentence on the accused.

If this view of the law be deemed too radical, then, the jury having failed to ascertain by their verdict the degree of the crime in accordance with the spirit of our criminal laws, they must be presumed to have intended to find the lowest grade of criminality which the evidence would justify. This, as we have seen, would be manslaughter.

In no view of the case can the sentence be sustained.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

MAXWELL, J., concurs.

REESE, J., dissents. (*See page 702.*)

18	416
18	507
21	668
18	416
35	371
18	416
96	84

THE STATE, EX REL. J. STERLING MORTON, v. WALLACE STEVENSON, COUNTY CLERK OF OTOE COUNTY.

- 1. Constitutional Law: INCREASE OF NUMBER OF DISTRICT JUDGES.** Under the provisions of section 11 of article VI. of the constitution, the legislature of 1885 had the power to provide by law for the election of a second judge of the district court for the second judicial district, notwithstanding that the legislature of 1883 had provided by law for the election of an additional judge for the third judicial district, and for the creation of four new judicial districts and for the election of judges for each thereof.
- 2. ———.** A court will not ordinarily listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not affect, and who has therefore no interest in defeating it. Cooley's Con. Lim., 5 Ed., 197.

3. ———. There is a wide difference between the weight and authority to be accorded and given to an act which has passed the legislature by a constitutional majority and through all stages of legislation, and been approved by the executive, although it may be inimical to some provision of the constitution, and a paper which, without having passed the legislature, has, through accident or design, found its way to a place among the authenticated statutes. The former should be respected and obeyed until declared invalid by the judiciary in a proper legal proceeding, while the latter may be disregarded by all.

ORIGINAL application for mandamus to compel respondent to issue and deliver to the sheriff of Otoe county notices of the election to be held in said county Nov. 8, 1885, in which shall be named the office of judge of the district court for the second judicial district.

Charles W. Seymour, Frank P. Ireland, and Edwin F. Warren, for relator.

Frank T. Ransom and John C. Watson, for respondent.

Mason & Whedon, for J. L. Mitchell, intervenor.

COBB, CH. J.

The principal question raised by the motion and affidavit of the relator and the answer of the respondent in this case is, whether the act of February 24, 1885, entitled "An act to amend sections one and three of an act entitled 'An act to apportion the state into judicial districts, and for the appointment and election of officers thereof,' approved February 24, 1883," approved March 10, 1885, is in violation of any provision of the constitution of the state. Comp. Stat., Ch. 5, § 8.

I assume it to be universally conceded that all legislative power of the people of this state not granted to the United States or prohibited to the legislature, or reserved to the people themselves in the constitution of the state, either

expressly or by implication, resides in the legislature. It will not be contended that the passage of the act in question was not the exercise of legislative power, nor that it was the exercise or attempt to exercise any part of the legislative power granted to the congress of the United States. Was it the exercise of a power prohibited to the legislature or reserved to the people themselves in the constitution, either expressly or by implication?

Section 11 of article VI. of the constitution contains the provision of that instrument which is claimed to be violated by the passage of the act under consideration. It reads as follows: "The legislature, whenever two-thirds of the members elected to each house shall concur therein, may, in or after the year one thousand eight hundred and eighty, and not oftener than once in every four years, increase the number of judges of the district courts and the judicial districts of the state."

Although the language of this section is that of a grant of power, yet it being found in an instrument which deals in prohibitions, restrictions, and reservations, and not in grants of power, it must be construed to be a restriction upon the general power of legislation inhering in the people as represented in the legislature.

The power of legislation on the subject under consideration is, by the terms of the above section, restricted in more respects than one. It is not to be exercised at all until the lapse of four years after the general taking effect of the constitution, and then only by the concurrence of two-thirds of the members elect of each house of the legislature. To these restrictions it is claimed that the language of the section adds another, to-wit, that the power of legislating to effect the above objects becomes exhausted and lies dormant until the lapse of another term of four years. While it is not my present purpose to deny the above construction, I will say that if it is the true meaning of our constitution—if one legislature may pass an act which the next legisla-

ture may not amend or repeal, or if one legislature possesses a power which is denied to its successor, then I think that it presents an anomaly in fundamental law-making, and is an exception to an otherwise universal rule.

But in the view that I take of the section of the constitution now under consideration, the power granted to the legislature, "Whenever two-thirds of the members elected to each house shall concur therein," to, "in or after the year one thousand eight hundred and eighty, and not oftener than once in every four years, increase the number of judges of the district courts," was not only not exhausted by the passage of the act of February 24, 1883, but is not exhausted by that of 1885.

Section one of the article of the constitution under consideration provides that, "The judicial power of this state shall be vested in a supreme court, district courts," etc. Section nine provides that, "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide," etc. Section ten divides the state into six judicial districts, and provides that, "In each of which shall be elected by the electors thereof one judge, who shall be judge of the district court therein," etc. Then follows section eleven. That part of which is applicable to the question being examined is herein quoted.

It will thus be seen that the constitution provided for six district courts, and that until the year 1880, and until the legislature by a two-thirds vote of each house should otherwise provide, there should be but one judge to each of said courts. But that after the year 1880, and by the legislative majority therein specified, the number of such judges might be increased. The number of such judges had only been fixed by the language, "The state shall be divided into six judicial districts, in each of which shall be elected by the electors thereof one judge." It is also true that, by the terms of the eleventh section, in and after the

year 1880 the legislature in the manner stated may increase the number of the judicial districts, and that would indirectly increase the number of judges, by force of the language of the tenth section, authorizing the electors of each of the original districts to elect one judge. But the language of the section empowers the legislature to directly "increase the number of judges of the district courts," and surely when a power is granted to do a thing directly we need not justify the doing of it under another indirect and constructive grant of power. There being then one judge provided for each of the six district courts, the legislature may, in or after 1880, increase this number. May they increase it in one district, or in any or all of them? Obviously, not only from the language used but from the very nature of the subject matter, in any or all of the districts. But not in any oftener than once in four years. Under this power the legislature of 1883 increased the number of the judges of the district court of the third district. But did such action exhaust the power of that legislature or any of its successors to increase the number of such judges in any or all of the other judicial districts not oftener than once in four years? I think not.

If this construction and these conclusions are correct; then the act of 1885, under discussion, as well as the act of February 24, 1883, are fully warranted by the provision of the constitution above quoted. The writer is of the opinion that there are other grounds upon which such legislation may be justified and defended against the charge of being inimical to the constitution of the state, but having, to my own satisfaction at least, found in the above considerations ample authority under the constitution for the legislation under consideration, the discussion of this branch of the case will not be further pursued.

There seemed to be a general desire on the part of the bar, the press, and the people throughout the state, and especially of the second and third judicial districts, that the

question of the constitutionality of the act of March 10, 1885, should be examined and decided by this court. Otherwise I should not have deemed such examination and decision necessary for the purpose of ascertaining the duty of the respondent to obey the law as it came from the legislative and executive branches of the state government. While it will not be denied that any citizen may invoke the provisions of the constitution, state or federal, for the assertion or protection of any of his rights, either of person, family, or property, yet it may well be doubted that the incumbent of a ministerial office, created by and whose current duties rest solely upon legislative authority, may invoke the provisions of the constitution as a justification of his refusal to discharge a plain statutory duty. Under our present system, lawsuits may be prosecuted or defended only by a real party in interest. Such party only has the right to make a record which will render the question litigated *res adjudicata*. This proposition is clearly established by authorities cited by counsel for the intervenor. The respondent can have no interest greater or different from that of any other citizen in the constitutional question which he invokes. If he has, it is so small, that it is sufficiently answered by the maxim "*De minimis non curat lex*."

In the case of *State, ex rel. Huff, v. McLelland*, ante p. 236, this court refused to issue a mandamus to compel the respondent, who is county clerk of Nance county, to insert in the notice of the annual election among the officers to be elected that of register of deeds, upon its being made to appear that the act of 1885, entitled "An act to provide for the election of register of deeds, and to define his duties and fix his compensation," etc., when introduced and passed both branches of the legislature, contained a provision for the election of a register of deeds only in counties having 15,000 inhabitants, but in the enrollment was so changed as to apply to "each county having a popula-

tion of 1,500 inhabitants or more;" the county of Nance having a population of more than 1,500 and less than 15,000 inhabitants.

The question presented in that case was not whether the law as printed in the statute book was inhibited by the terms of the constitution, but whether it had passed the legislature at all. And I think there is a wide difference between the weight, character, and consideration to be given to a paper which has passed through all the stages of legislation in due form, and been approved by the executive and placed in the proper custody, although it may be of a character inhibited by the terms of the constitution, and a paper which without having been considered or passed by the legislature has, through accident or design, found a place among the laws. The former should be respected and observed until declared invalid by the judiciary in a proper legal proceeding, while the latter may be disregarded by all.

A writ of mandamus will issue as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	422
26	252
18	422
33	769
18	422
46	738
18	422
45	330
18	422
50	688

THE STATE OF NEBRASKA, EX REL. TOBIAS CASTOR, v.
THE BOARD OF SUPERVISORS OF SALINE COUNTY
ET AL.

1. **Township Organization:** TRIAL OF COUNTY OFFICERS BY SUPERVISORS. In counties under township organization the board of supervisors have authority to hear and determine complaints against county officers under the provisions of article two, chapter 18 of the Compiled Statutes 1885.
2. ———: ———: COMPLAINT. When the board has assumed jurisdiction of such a cause, and has passed upon the sufficiency

State v. Saline County.

of the complaint, and afterwards refused to act in the case, and upon an application to the supreme court in the exercise of its original jurisdiction for a mandamus to compel action, the court will not inquire into the sufficiency of the complaint further than to ascertain if it is such a complaint. To that extent the complaint was examined, and *Held*, Sufficient.

3. **Mandamus:** JUDGMENT OF COUNTY BOARD CANNOT BE CONTROLLED. While the supreme court can by a mandamus compel a board of county supervisors to act upon a complaint against a county officer, yet it can in no way control its judgment or legal discretion.
4. **Removal of County Officers:** TRIAL BEFORE COUNTY BOARD. A respondent, in a proceeding to remove him from a county office, has the right to present as many legal questions for decision by the county board as he may think necessary for his proper defense, but the board has the authority and right to decide such questions either with or without argument, as it may deem proper. It is not required to waste time in listening to unnecessary arguments.
5. ———: UNNECESSARY COSTS TAXED TO PARTY MAKING THEM. Where a party to a proceeding before the county board causes the attendance of unnecessary witnesses, or in any other manner needlessly augments the costs and expenses of a trial, it is within the power of the board to tax such unnecessary costs to the party making them, and it should in all proper cases exercise such power.
6. ———: QUORUM OF BOARD SUFFICIENT. In a proceeding before a board of supervisors to remove from office a county officer two-thirds of all the members elected constitute a quorum. It is not essential that all the members be present. But of a special meeting all must be notified.
7. ———: DUTY OF COUNTY BOARD. When a complaint against a county officer is made and filed with the county clerk it is the duty of the county board to hear it. They have no authority to order its removal to the district court for trial.

ORIGINAL application for mandamus.

Griggs & Rinaker, for relator.

F. I. Foss, J. H. Grimm, Ryan Brothers, and Abbott & Abbott, for respondents.

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, for a writ of mandamus directed to the county board of supervisors of Saline county requiring it to proceed to the examination of certain charges preferred against Charles W. Meeker, the clerk of the district court, by the relator herein.

From the record before us it appears that on the fourth day of August, 1885, the relator filed in the office of the county clerk of Saline county a complaint against Meeker charging him with official misdemeanors as such officer, and that the county clerk issued a summons to him, as is provided by article two of chapter eighteen of the Compiled Statutes of 1885. The charges and specifications are quite lengthy, and will not be noticed in detail. On the 25th day of August the matter came up for hearing before the supervisors, when the respondent filed a plea to the jurisdiction of the board. In this it was contended that the statute not having conferred such powers upon the board of supervisors, they were without authority to act. The session continued from day to day, until the 29th. During this time a number of other pleas, motions, etc., were filed by the respondent, which were, briefly stated, as follows:

Denying the right of the board to proceed without all the members being present.

That the costs be taxed to complainant.

An objection to the board delegating any of its powers to the chairman, such as determining the order of argument upon interlocutory questions, etc.

A general demurrer to the complaint.

An objection to the jurisdiction of the board, for the reason that a member was acting without authority, he not being a legal member of the board.

Denying the jurisdiction of the board, for the reason that two townships of the county were without representation thereon.

A demand for a jury trial.

A demand or motion for permission to examine the members of the board as to their qualifications to sit in the case.

A motion for a change of venue.

These questions were disposed of in their order, and the case retained for hearing, until the board, apparently tired of the protracted proceedings, and perhaps uncertain as to their powers and duties, passed the following preamble and resolution :

"Whereas, Three days have already been used by this board in the consideration of the case of *The State, ex rel. Castor, v. Meeker* ; and

"Whereas, All of said time has been given to the consideration of motions made by defendant's counsel ; and

"Whereas, Counsel for defendant have notified this board that they intend to file separate objections to each and every one of the thirty specifications in the complaint, and subpoena 1920 witnesses ; and

"Whereas, Owing to the dilatory motions made by defendant, and proposed to be made, and the length of time consumed by defendant in discussing said motions, it will be almost impossible to ever reach a final conclusion of said cause before this board ; and

"Whereas, Counsel for defendant not only refuse to obey the orders of this board, but often use insulting language toward the members thereof, and declare that said board has no power to punish for contempt, or to compel them to obey the orders of this board, nor authority to issue subpoenas, or compel the enforcement of its orders ; and

"Whereas, This board has no power to enforce its orders, and cannot compel the defendant to desist from filing motions, and to proceed with the trial of this cause ; and

"Whereas, It is held and ruled, on motion of defendant,

that all the twenty members of this board must be present in order to legally try this cause; and

"Whereas, It will scarcely be possible for all the members of this board to be present during the great length of time which will be required to complete the hearing of said cause; and

"Whereas, Counsel for defendant strenuously urge that the board may and should, under the law, direct the county attorney of this county to take this cause to the district court for trial; therefore, be it

"*Resolved*, By this board, that the county attorney of this county be and is hereby instructed to carry this case to the district court of this county for trial, and that this board refuses to proceed any further with the hearing of this cause, and the costs thus far made be and are hereby taxed to the complainant."

Another "motion" was filed by the respondent, but no further action was taken by the board. It is now sought to compel action. If this court has jurisdiction to issue the writ at all it can only be to require respondent to act, and exercise its judgment. It cannot control legal discretion. Sec. 645, Civil Code.

The first question presented by the respondents is as to the sufficiency of the charges and specifications. As the present jurisdiction of this court in this case is original and not-appellate, we can have no occasion to pass upon this question. It appears from the record that the county board has held them to be sufficient. That must be final, so far as the action of the board is concerned, until reversed either by itself or by an appellate tribunal. It may be, and is perhaps, true that we may look into the record sufficiently to ascertain whether or not the paper styled "charges and specifications" contains enough to raise it to the dignity of what it purports to be, and for that purpose we have examined it and found it sufficient.

The next, and perhaps most important, question pre-

sented by this record is as to the jurisdiction and powers of a board of county supervisors to entertain charges of this kind, and remove county officers from office. The power of county commissioners to do so under the provisions of Art. 2 of chapter 18 of the Compiled Statutes of 1885 is conceded. But it is claimed by respondents that a board of supervisors has no such power. Section 2 of the act referred to provides that, "any person may make such charge, and the board of commissioners shall have exclusive original jurisdiction thereof by a summons." This act was passed by the territorial legislature, being found in chapter 45 of the Revised Statutes of 1866, and has remained upon our statute books ever since. At the time of its passage the laws of the territory provided for a system of county government only by a board of county commissioners. (See chapter 9, Revised Statutes, 1866.) This law remained in force until the act of February 27, 1873, took effect. (General Statutes, p. 241.) The new law continued in force the provisions of the old, so far as the board was concerned, and provided, Sec. 2, page 232, that "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." On the first day of November, 1875, the present constitution became the supreme law of this state. Section five of the article (10) on counties requires the legislature to provide by general law for township organization, under which any county might organize when a majority of the legal voters should so decide. Under this provision of the constitution the present law was passed. Section 21 of chapter 18 of the Compiled Statutes of 1885 is as follows: "The powers of the county as a body corporate or politic shall be exercised by a county board, to-wit: In counties under township organization by a board of supervisors, which shall be composed of the town and such other supervisors as are or may be elected pursuant to law; in counties not under township organization, by the board of

county commissioners." From the legislation upon this subject it would seem that in so far as the authority of the counties as a body politic was concerned, it was the purpose of the legislature to make the board of county supervisors the successors in office of the commissioners upon the adoption of township organization, and *vice versa* upon its discontinuance, so far as their powers were concerned, which were not changed by law. It is provided that when township organization shall cease the offices of the county commissioners made vacant shall be restored as at the time of its adoption; that the commissioners shall be the legal successors of the supervisors, etc. Secs. 67, 68, and 69, Chap. 18, Compiled Statutes 1885.

In the *State, ex rel., v. Oleson*, 15 Neb., 247, it was held that, "The trial and ousting from office of a sheriff for corruption, under paragraph 5 of Sec. 1, Art. 2, Chapter 18, Compiled Statutes, by the board of county commissioners, is not the exercise of judicial power nor of the power of impeachment, but of a quasi political and administrative power not denied to such bodies by the constitution." This being true, and the board of supervisors being a substitution for the board of commissioners in the general exercise of this political power, it would seem to be clear that such board would succeed to the powers of the commissioners of that nature, except where otherwise provided by statute, or to be clearly inferred. As we have seen, at the time of the passage of the law for the removal of county officers the board of commissioners was the only administrative and political agency of the counties of the territory and state, and with that view the law was passed, not so much to confer the jurisdiction upon the commissioners, but upon the body exercising and enforcing this administrative and political power.

We therefore conclude that the county board of supervisors has all the jurisdiction and power under the law for the removal of county officers in counties under township

organization that the board of commissioners has in counties not under such organization, and that it is the duty of respondents to proceed with the trial of the charges preferred against the clerk. This of course is to be understood as not in any way interfering with their discretion or judgment in passing upon any legal questions arising in the case, either upon the sufficiency of the allegations of the complaint, the competency of testimony, or their final conclusion. Nor can it affect the rights of the parties as to the presentation of legal questions by motion or otherwise during the hearing, if one is had.

In view of the very remarkable preamble and resolutions adopted by the board, it is deemed proper to notice some of the recitals and declarations therein in order to furnish a guide for their future action upon the questions therein referred to.

It is said "counsel for defendant have notified this board that they intend to file separate objections to each and every one of the thirty specifications in the complaint, and subpoena 1920 witnesses."

The defendant, by his counsel, has the right to attack "each and every" of the charges and specifications contained in the complaint. But in this they must be governed by the usual rules of practice obtained in courts of justice, and all these objections would have to be in one paper filed at once and disposed of at once. If any of the charges or specifications should be found insufficient in law they can be so held, and the objection as to them sustained. As to the array of witnesses, it is clearly within the power of the board to tax the costs made by calling unnecessary witnesses to the party calling them; and this power should be freely exercised if necessary.

Another recital is to the effect that as defendant had filed and proposed filing dilatory motions, and the length of time occupied in discussing them, it would be impossible for the board to reach a final conclusion, etc. There

can be no doubt but that a respondent in such case has the right to present such legal questions for decision as he may think necessary to his proper defense. But it is equally clear that the board have the right to decide all such questions either with or without argument, as they may prefer, and where a question is presented upon which they feel ready to decide without argument they should do so. No time should be lost listening to unnecessary arguments.

It is recited further, that the defendant refuses to obey the orders of the board, uses insulting language toward the members, and that the board has no authority to enforce its orders, etc. Upon this part of the case the relator has cited no statute conferring this power upon the board. But if such power does not exist it does not deprive the board of the power to hear the case and decide upon the merits of the testimony adduced, and it can hardly be believed that a respondent in such a proceeding would be willing to mistreat or show disrespect for the tribunal whose duty it was to pass upon questions so directly affecting his interests. The suggestion that a respectable attorney would do so is not to be for a moment entertained.

The ruling of the board that "all the twenty members of the board must be present in order to legally try the cause" is most clearly wrong. "Two-thirds of all the supervisors elected in the county shall constitute a quorum," etc. Sec. 68, Ch. 18, Compiled Statutes 1885. But of a special meeting all must be notified.

The board had no authority to direct the county attorney to take the case to the district court or to any other court. It is their duty to hear it and decide it so long as the relator insists upon the same being done.

It is the duty of the board to act in the case. It having refused to do so the writ must be awarded as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. JOHN C. METCALF,
v. O. C. REYNOLDS ET AL.

18	431
19	169
18	431
34	443
18	431
37	632
18	431
42	756

1. **Liquors: LICENSE: REMONSTRANCE.** The provision of section three of chapter fifty of the Compiled Statutes of 1885, by which it is provided that upon an objection, protest, or remonstrance being filed against the issuance of a license to sell intoxicating liquors, the county board or city council shall appoint a day for hearing the case, is mandatory, and the board or council have no authority to proceed immediately to the investigation of the matters alleged in the remonstrance, and a mandamus will issue to compel the proper action of the board or council.
2. ———: ———: **HEARING.** The fact that a representative of the remonstrants was present and made no objection to the matter being investigated by the council, would not confer the right upon such council to issue the license without appointing a time for the hearing, neither would the board or council have the right to appoint the then present time for such hearing. The purpose of the law is that a *future* time must be appointed in order that all persons interested may be present with their witnesses.
3. ———: ———: **MANDAMUS.** Upon an application for a mandamus to compel the appointment of a time for the hearing of a remonstrance it is no defense to allege, nor will this court inquire as to, the falsity of the facts alleged in the remonstrance. It is sufficient if one is filed.

ORIGINAL application for mandamus.

Ada H. Bittenbender and *H. C. Bittenbender*, for relator.

D. C. McKillip, for respondent.

REESE, J.

On the first day of the present term of this court an application for a writ of mandamus was made, and upon hearing the same a peremptory writ was granted. On

that day court adjourned until the 11th of August, in accordance with an order at that time made, and of which notice had been previously given by the clerk. After the issuance and service of the writ the respondents appeared and moved to vacate it, and for leave to answer to the merits, alleging as ground therefor that they had been misled by the adjournment of the court, having been led to believe that no business would be transacted until the 11th of August. The motion contains other grounds which we will notice in their order.

The application for the writ alleged in substance that the respondents were the mayor and city council of the city of Seward; that prior to the 23d day of April, 1885, one Frederick Bick filed in the office of the city clerk of Seward his petition for a license to sell intoxicating liquors, due notice of which was given, and that on the date above named, and during a session of the city council, the relator, with others, filed with them a remonstrance in writing, objecting to and resisting the granting of the license; that the respondents instead of appointing a day for the hearing of said cause, as required by section three, chapter 50, Compiled Statutes of 1885, proceeded at once and on that day and at that session to grant the license, which was then done. A mandamus was prayed to compel a compliance with the law. The answer alleges that the city council did appoint a day for hearing the questions presented by the remonstrance, and that the day so appointed was the same day, to-wit, the 23d of April, at the meeting of the council then in session; and that the remonstrance was fully heard at that time and the objections found to be without merit, and it is sought to be shown by affidavits on file that the attorney for remonstrants was satisfied with the investigation and made no further objections to the granting of the license. The record of the proceedings of the council is as follows:

“Petition and bond of Frederick Bick to sell malt,

spirituous, and vinuous liquors in the first ward was accepted and license ordered by the following vote: Yeas, Sanders, Mulfinger, and Merriam. Nays, Welch.

"Messrs. Beaver, Chapin, Metcalf, and Hays remonstrated against issuing F. Bick license. Remonstrance overruled and license granted."

While it is perhaps true that the record of the council would be the only proper evidence of what was done, so far as the facts should properly appear of record, and that the record does not show the appointment of a time at which the remonstrance should be heard, yet we think the facts claimed, even if shown by the record, would be no defense to this proceeding.

The section of the law above referred to is as follows: "If there be any objection, protest, or remonstrance filed in the office where the application is made, against the issuance of said license, the county board (city council) shall appoint a day for hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license."

It will be seen that if there be any "objection, protest, or remonstrance," the board or council "shall appoint a day for hearing of said case." This language is imperative and mandatory. No further action toward granting the license can be taken. The power of the council to proceed further, except to appoint a day for hearing, is suspended. They have but one duty to perform and that is to "appoint a day for hearing." They could no more legally ascertain the truth or falsity of the allegations of the objection, protest, or remonstrance, than if they were formally adjourned and each man went upon the street as a committee of one, by his own appointment, and made inquiry therein. They

must sit as a board, upon the day fixed, for the purpose of deciding upon the merits of the allegations of the remonstrance. The spirit and purpose of this section of the law is, that a time shall be appointed for the hearing, of which the parties may take notice and at which they may appear with their witnesses. Guided by its provisions no one would think of appearing before the council with witnesses, taking the chance of being crowded out by other business and compelled to pay the costs of their attendance, but rather would he appear at the time to be appointed when the business before the council would be the hearing of that particular case. The law and reason both clearly contemplate the appointment of a day other than the one on which the remonstrance is presented.

The answer further alleges that the allegations of the remonstrance are and were wholly untrue, and that this fact was clearly shown and proven on the 23d of April, at the time the remonstrance was heard. This may all be true, and yet there being no authority or power lodged in the council to so hear or decide at that time, it could constitute no defense to the writ. The question is as to what was the duty of the council at the time, and not what were the merits of the remonstrance.

The affidavits and proofs tend to show that the attorney or representative of the remonstrants was present at the time the final action was taken, and made no objection to it. This in our view could not change the matter. The law prescribed the duty of the council. The mere fact that no objection was made could not relieve them of that duty. The proceeding was statutory, and the statute should be complied with.

It follows that the writ was properly issued in the first instance, and that the motion to vacate the same must be overruled, which is done.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ELIZABETH PEMBERTON ET AL., APPELLEES, v. WILLIAM Z. POLLARD, APPELLANT.

1. **Husband and Wife: DEED TO TRUSTEES FOR WIFE.** Where land was conveyed by husband and wife by warranty deed to trustees appointed by the will of her father, for the "sole and separate use and benefit" of the wife, etc., the consideration being derived from the father's estate a provision in the deed that the husband "shall have the right to occupy, farm, and control said lands for her (the wife)" does not create any estate in him, where there is no fraud.
2. **Judgment of Justice: HOW MADE LIEN ON REAL ESTATE.** The transcript of a judgment of a justice of the peace, to become a lien upon real estate, must be filed in the district court of the county where the judgment was recovered, and cannot in the first instance be filed in the district court of another county.

APPEAL from Hamilton county. Tried below before NORVAL, J.

Lamb, Ricketts & Wilson and *R. A. Batty*, for appellant, cited: *Follett v. Tyrer*, 14 Simons, 125. 3 Wash. Real Prop., 375-378. *Hall v. Ionia*, 38 Mich., 493. *French v. Carhart*, 1 N. Y., 96. *Richardson v. York*, 14 Me., 216. Tyler on Infancy and Coverture, § 288. *Canby v. Porter*, 12 Ohio, 79. *Cushing v. Blake*, 30 N. J. Eq., 689. *Rosenfield v. Chada*, 12 Neb., 25.

J. H. Smith, for appellees, cited: *Jackson v. Ireland*, 3 Wend., 99. *Tarter v. Hall*, 3 Cal., 263. *Parker v. Mo-Millan*, 21 N. W. R., 305. *Nichols v. Eaton*, 91 U. S., 716.

MAXWELL, J.

This is an action for an injunction to restrain the sale of certain real estate upon execution, and to quiet the title in the plaintiffs. The defendant demurred to the petition,

and the demurrer being overruled a decree was rendered in favor of the plaintiffs. The defendant appeals. The principal portion of the petition is as follows :

"The plaintiff complains of the defendants, for that on the 23d day of December, A.D. 1876, the plaintiffs were and from thence hitherto and still are the owners and in possession of the following described premises, to-wit :

"The north-west quarter of section number four, in township number nine north, of range number seven west.

"That the plaintiffs became the owners of said premises by virtue of a certain conveyance or deed in the following words and figures, to-wit :

"This deed made this 22d day of December, A.D. 1876, between William D. Pemberton and Elizabeth Pemberton, his wife, of Hamilton county, Nebraska, of the first part, and Ebenezer Z. McColloch and George C. McColloch, trustees, of Ohio county, West Virginia, of the second part, witnesseth : That said parties of the first part in consideration of the sum of twelve hundred dollars in hand paid, the receipt of which is hereby acknowledged, do grant, sell, and convey unto the said parties of the second part, with covenants of general warranty, the following described real estate with all and singular the tenements, appurtenances, and hereditaments thereto belonging. That is to say, the north-west quarter of section four (4), in township nine (9) n., of range seven (7) west, containing one hundred and sixty and $\frac{37}{100}$ acres ($160\frac{37}{100}$), said land lying and being situated in Hamilton county, Nebraska. To have and to hold the said real estate with its appurtenances to the said second parties as trustees of said Elizabeth Pemberton, they being appointed such trustees by the will of their father, Ebenezer McColloch, late of Ohio county, West Virginia, for her sole and separate use and benefit so long as she may live, and after her death for the use and benefit of her children. The said trustees having the power to sell and convey said land, or any part thereof,

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on the written request of said Elizabeth Pemberton, and her joining with them in any such conveyances. It is further expressly understood and agreed by and between the parties of this deed, that said William D. Pemberton shall have the right to occupy, farm, and control said land for her so long as he may live (and) the legal title thereto remains in said trustees.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

"WILLIAM D. PEMBERTON,

"Witness,

"ELIZABETH PEMBERTON.

"S. B. MCCOLLOCH.

"That said deed was duly and legally acknowledged as the law requires, and on the 4th day of January, A.D. 1877, was duly filed for record in the county clerk's office in and for Hamilton county, Nebraska, and recorded in book 'B' of deed record of said county, on page 1379. That on or about the 7th day of September, 1870, Ebenezer McCulloch, deceased, and who was the father of the plaintiffs, made his will," etc., a copy of which is set out in the petition, from which will it appears that the testator devised to Elizabeth Pemberton certain real and personal estate, the proceeds of which were to be retained in the hands of the plaintiffs as trustees for said Mrs. Pemberton and her children, "her husband to have no control over the same whatever, but the said trustees may, with the consent of said Elizabeth Pemberton, invest the same as they may deem best, so that my daughter and her children shall have the benefit of the same without control from her husband." It is also alleged that in pursuance of the terms of the will the property devised to Elizabeth Pemberton was sold and the proceeds invested in the land in question; that on the 14th day of June, 1883, C. N. Paine & Co. recovered a judgment against William D. Pemberton, the husband of Elizabeth, before a justice of the peace of Hall county, for

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the sum of \$148.32; that on the 5th day of October, 1883, said Paine & Co. caused a transcript of said judgment to be filed in the district court of Hamilton county, and caused an execution to be issued thereon and levied upon the real estate in question, as the property of William D. Pemberton. It is also alleged that said judgment is not a lien on said real estate, and that said William D. Pemberton has no interest in said real estate, and that a sale upon execution would cast a cloud upon the plaintiffs' title, etc. It is not alleged, nor does it appear from the petition, that Elizabeth Pemberton is dead. The question, therefore, for determination is, does the reservation in the deed of William D. Pemberton to the plaintiffs constitute such an interest in the land as is liable for his debts? It will be observed from an examination of the deed that the conveyance is made "for her (Elizabeth Pemberton's) sole and separate use and benefit so long as she may live, and after her death for the use and benefit of her children, the said trustees having the power to sell and convey said land or any part thereof on the written request of said Elizabeth Pemberton," etc. The reservation is, that "William D. Pemberton shall have the right to occupy, farm, and control said land for her," etc. These words do not create a life estate. At the most they create him a trustee for her in the management of the land. He is not entitled to appropriate the products of the soil or any part thereof to his own use, but the service is to be rendered for his wife. This does not create a life estate.

In *Richardson v. York*, 14 Me., 216, cited by the appellant, the reservation was of the use and control of the lands by the grantor during his natural life. Such language undoubtedly created a life estate, but no such intention is apparent in this case. In the case under consideration the object of the testator in placing the amount devised to Elizabeth Pemberton in the hands of trustees, the object of the trustees in purchasing the land in question, and of William D. Pemberton in making the deed to said

trustees, evidently was to exclude him from all estate or interest in the land. There is no charge of fraud, nor any claim that this entire transaction is not *bona fide*. We therefore must treat it as such. Being a *bona fide* transaction, the entire estate passed by the deed of conveyance to the plaintiffs as trustees, and William D. Pemberton has no estate therein.

2. The judgment before the justice of the peace was recovered in Hall county, and a transcript thereof filed in Hamilton county without having been filed in the district court of Hall county. This the code does not authorize. The authority to file a transcript of a judgment recovered before a justice of the peace, in the district court of the county where the judgment was rendered, is derived alone from the statute, and its provisions must be substantially complied with. Upon the transcript being filed the clerk is required to "enter the same on the execution docket, together with the amount of the judgment and the time of filing the transcript. Code, § 561. The next section provides that the judgment shall be a lien upon the real estate of the debtor, etc., * * * "to the same extent as if the judgment had been rendered in the district court."

Sec. 563 provides that execution may be issued on the judgment in the same manner as if the judgment had been taken in that court. Sec. 429 provides that the transcript of a judgment of any district court of this state may be filed in the office of the clerk of the district court in any county, and such transcript shall be a lien on the property of the debtor in any county in which such transcript is filed in like manner as in the county where such judgment was rendered, and execution may be issued on judgment obtained by such transcript, as on the original judgment; *Provided*, Such transcript shall at all times be affected and be in the same plight as the original judgment.

It is but reasonable to require a transcript of a judg-

ment rendered by a justice of the peace to be filed in the county where the judgment was recovered, where it is to be presumed the parties, or some of them at least, as well as the justice, are known, and where creditors may be enabled by an examination of the docket to determine what judgments exist against the debtor. There was no authority, therefore, to file the transcript of the justice of the peace in Hamilton county, the proper mode being to file a transcript from the district court of Hall county. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	440
28	333
18	440
46	120
18	440
47	535

PATRICK CHAPLIN, PLAINTIFF IN ERROR, v. FRANCIS LEE, DEFENDANT IN ERROR.

1. **Embezzlement: SLANDER.** In an action for slander, on a charge of larceny and embezzlement as treasurer of a school district, where the testimony is conflicting as to the funds in the hands of the treasurer, it is not error to refuse to give an instruction that if the treasurer has "refused to pay any draft, order, or warrant drawn upon him by the proper officer or officers, this would constitute embezzlement."
2. ———. To constitute embezzlement it is essential that the owner should be deprived of the property alleged to be embezzled by an adverse use or holding.

ERROR to the district court of Colfax county. Tried below before POST, J.

Phelps & Thomas, for plaintiff in error, cited: Sec. 124, Criminal Code.

J. A. Grimison, for defendant in error.

MAXWELL, J.

Lee was treasurer of school district No. 11, of Colfax county, and while exercising the duties of that office, Chaplin, in conversation with divers persons, stated in substance that he (Lee) had been guilty of the larceny and embezzlement of \$65.00 of the funds of the district in his hands. The exact words with proper innuendoes are set out at length in the petition. Chaplin in his answer alleges, "that he has no recollection or belief of having so as set forth in said petition accused the said plaintiff, but if he did so accuse the said plaintiff the charge is true," etc. He then proceeds to set forth various acts of Lee, which he alleges justify the charge. On the trial of the cause the jury returned a verdict in favor of Lee for the sum of \$125.00, upon which judgment was rendered. The principal error relied upon in this court is, that the court erred in refusing to give the following instruction:

"If you find that the plaintiff while acting as and being treasurer of said school district refused to pay any draft, order, or warrant drawn upon him by the proper officer or officers, this would constitute embezzlement, and your verdict should be for the defendant."

The testimony is conflicting as to whether or not there were funds in Lee's hands for the payment of all orders drawn upon him. He could only be required to pay orders when there were funds in his hands for that purpose, but the instruction asked ignored the question of the sufficiency of funds, and sought to make the mere refusal to pay an order or draft evidence of embezzlement. Such is not the law, and the instruction was properly refused.

In *Pollard v. Lyon*, 91 U. S., 225, Mr. Justice Clifford classified words which are actionable as follows: "1. Words falsely spoken of a person, which impute to the party the commission of some criminal offense, involving moral turpitude, for which the party, if the charge is true, may

be indicted and punished. 2. Words falsely spoken of a person, which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. 3. Defamatory words, falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such office or employment. 4. Defamatory words, falsely spoken of a party, which prejudice such party in his profession or trade. 5. Defamatory words, falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage. The 1st, 2d, 3d, and 4th of these classes are actionable *per se*, and the 5th when special damages are sustained." The above classification is adopted by Judge Cooley in his work on Torts, page 196 *et seq.*, and may be regarded as correct. The general rule is, that words charging another with a crime involving moral turpitude punishable by law are actionable *per se*. *Ranger v. Goodrich*, 17 Wis., 80. *Filber v. Dauterman*, 26 Wis., 518. *Miller v. Parish*, 8 Pick., 384. *McCuen v. Ludlum*, 17 N. J., 12. *Hong v. Hatch*, 23 Conn., 585. To falsely charge a party with embezzlement or larceny is actionable *per se*, and injury will be presumed, and the defendant in justification must establish the truth of the charge. *Seeley v. Blair*, Wright, 683. *Hicks v. Rising*, 24 Ill., 566. *Ellis v. Buzzell*, 60 Me., 209. *Merk v. Gilzhaeuser*, 50 Cal., 631. Embezzlement is defined as the act of fraudulently appropriating to one's own use what is intrusted to the party's care and management. Webster's Dict., 439. It differs from larceny in this, that the latter is the felonious taking and carrying away of the personal goods of another with the intent to deprive the owner permanently of his property therein. *Thompson v. The People*, 4 Neb., 528. 2 Broom & H. Com. (Am. Ed.), 513. *State v. Gresser*, 19 Mo., 247. *Phelps v. The People*, 55 Ill., 334. 4 Black's Com., 230, 235. But em-

bezzlement is the wrongful appropriation of what is already in the wrong-doer's possession. To constitute the crime the owner must be deprived of the property by an adverse use or holding. At the most the refusal to pay a warrant or order would only be evidence tending to show embezzlement. The question was very fully considered in a late case by the supreme court of Massachusetts in *Com. v. Este*, 2 N. E. Rep., 769. In some respects the charge in that case was similar to the slanderous words spoken in this. It is said: "Embezzlement retains so much of the character of larceny that it is essential to the commission of the crime that the owner should be deprived of the property embezzled by an adverse holding or use. No doubt questions may arise as to what is a sufficient deprivation or adverse holding, as is shown in *Com. v. Mason*, 105 Mass., 163, and cases cited. See also *Rev. v. Hall*, Russ & R. Cr. Cas., 463, 464. *Rynice v. Richards*, 1 Cockb. & R., 532. But the principle remains. And when property is held at every moment as and for the master's property, fraud as to the source from which it comes, or fraudulent intent as to something else, is not a sufficient substitute for something else. To this extent we entirely agree with the English case of *Regnia v. Poole*, Dears & B. Cr. Cos., 345. *Regnia v. Holloway*, 2 Cockb. & R., 942, and 1 Dennison Cr. Cos., 370. *Rev. v. Webb*, 1 Moody, 431." This, we think, is a correct statement of the law. The owner must be deprived of the use of the property claimed to be embezzled by an adverse holding or use. This element is entirely disregarded in the instruction asked. The law presumes every person to be free from crime, and this presumption continues as evidence in his favor until overcome by proof of guilt. The law also protects, as far as possible, the good name of every one, and places its seal of condemnation upon any person who by false and slanderous words seeks to injure another. The verdict in the case is fully supported by the

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evidence, and there is no error in refusing the instruction asked. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	444
45	784
18	444
51	243
18	444
61	66
18	444
62	234

EDGAR A. BALDWIN, APPELLEE, v. SAMUEL M. BOYD
AND MARY L. BOYD, APPELLANTS.

1. **Public Lands of United States: RECITALS IN PATENT.**

A patent from the United States, which contains a recital that the purchaser (naming him) "has deposited in the general land office of the United States a certificate of the register of the land office at Lincoln, Nebraska, whereby it appears that full payment has been made by the said (purchaser) according to the provisions of the act of congress of the 24th of April, 1820, entitled an act making further provisions for the sale of the public lands," merely shows that the purchaser has made the payments required by law to entitle him to enter the land, and is not a recital that the patent was issued under the act of 1820.

2. ———: **EXEMPTION FROM DEBTS PRIOR TO ISSUANCE OF PAT-**

ENT. Where lands are entered under the homestead law of the United States, and afterwards, upon proper proof and payment of the price, the homestead commuted, such lands are not subject to sale on execution on a debt contracted before the patent was issued. And where such lands were exempt from debts when conveyed to a purchaser, the exemption continues in favor of the grantee and he may plead the same.

APPEAL from the district court of Lancaster county.
Heard below before POUND, J.

Sawyer & Snell, N. S. Scott, and M. L. Easterday, for appellants.

Plaintiff claims under a patent issued under act of 1870, and he introduces a patent issued under act of 1820.

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Then proceeds by extrinsic evidence to show that the land department erred in judgment. The decisions are uniform, that the records of the proceedings of the land office, to impeach the validity of a patent, are not admissible, unless the patent is absolutely void upon its face, or the issuance thereof was without authority, or was prohibited by statute, or the state had no title to the lands patented. *Ferry v. Street*, 7 Pac. Rep., 712. *Smelting Co. v. Kemp*, 104 U. S., 636. *Patterson v. Winn*, 11 Wheat., 380. *Clark v. Lancaster*, 36 Md., 196. *Mann v. Mann*, 14 Johns., 1. Wade on Notice, Div. IV., Chap. 2. A purchaser from one holding under a patent is not bound to look behind the patent to learn if it was properly issued to the one properly entitled to it. Warville on Abstracts, 132, § 5. *Schnee v. Schnee*, 23 Wis., 377. On second point, cited: *Forgy v. Merryman*, 14 Neb., 515. *Howland v. Fuller*, 8 Minn., 30. *Richards v. Haines*, 30 Iowa, 574.

Mason & Whedon, for appellee, cited: *Perry v. Ashby*, 5 Neb., 293. *Smelting Co. v. Kemp*, 104 U. S., 647.

MAXWELL, J.

This is an action to cancel a sheriff's deed to the defendants for "thirty-five acres off the west end of the north half of the north-west quarter of section 19 in township 10 north, of range 7 east of the 6th principal meridian," and to quiet the plaintiff's title. The court below found the issues in favor of the plaintiff, and rendered a decree in his favor.

It appears from the record that in May, 1871, one Charles E. Van Pelt entered as a homestead, under the laws of the United States, the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 19, T. 10 N., R. 7 E. of 6 P. M., containing 118 $\frac{72}{100}$ acres; that Van Pelt was the head of a family and over the age of twenty-one years, and had served as a soldier in the army of the United

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States, during the rebellion, for ninety days and upwards, and had ever been loyal to the United States; that on the 15th of February, 1872, said Van Pelt having cultivated and improved said homestead, and resided thereon as required by law, in pursuance of the act of congress, paid to the receiver of the land office at Lincoln the sum of \$2.50 per acre, with proper proof of settlement and cultivation, and obtained the receiver's receipt, etc., and a patent was duly issued to him on the 15th of June, 1874. On the 23d day of June, 1873, Van Pelt and wife conveyed said premises by warranty deed to the plaintiff, which deed was not filed for record until the 7th day of May, 1874. On the 16th of July, 1873, the defendant, Samuel M. Boyd, recovered two judgments in the probate court of Lancaster county against Charles E. Van Pelt, one of said judgments being for the sum of \$148.75 and costs, and the other for the sum of \$467.92 and costs. Transcripts of said judgments were duly filed in the office of the clerk of the district court on the 17th day of July, 1873, and executions issued thereon and the thirty-five acres of land in controversy sold to the defendants, and in January, 1874, the sale was confirmed and a deed ordered and made to the purchaser, and this is the cloud on the plaintiff's title complained of.

The first objection made by the appellant is, that it appears from the patent that "full payment has been made by Charles E. Van Pelt according to the provisions of the act of congress of April 24, 1820, entitled 'An act making further provisions for the sale of public land.'"

The following is a copy of the patent:

"THE UNITED STATES OF AMERICA.

"To all to whom these presents shall come, greeting:

"CERTIFICATE NO. 2525.

"Whereas, Charles E. Van Pelt, of Lancaster county, Nebraska, has deposited in the GENERAL LAND OFFICE of the United States a certificate of the register of the land

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office at Lincoln, Nebraska, whereby it appears that FULL PAYMENT has been made by the said Charles E. Van Pelt according to the provisions of the act of congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the north half of the north-west quarter and the north-west quarter of the north-east quarter of section nineteen in township ten north, of range seven east, in the district of lands subject to sale at Lincoln, Nebraska, containing one hundred and eighteen acres and seventy-eight-hundredths of an acre, according to the official plat of the survey of the public lands returned to the GENERAL LAND OFFICE by the SURVEYOR GENERAL, which said tract has been purchased by the said Charles E. Van Pelt.

"*Now know ye* that the UNITED STATES OF AMERICA, in consideration of the premises and in conformity with the several acts of congress in such case made and provided, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said Charles E. Van Pelt and to his heirs, the tract above described, TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Charles E. Van Pelt.

"In testimony whereof, I, Ulysses S. Grant, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made patent, and the seal of the GENERAL LAND OFFICE to be hereto affixed.

"Given under my hand at the city of Washington the fifteenth day of June in the year of our Lord one thousand eight hundred and seventy-four, and of the independence of the United States the ninety-eighth.

"By the President, U. S. GRANT.

"By S. D. WILLIAMS, *Secretary*."

Section 2 of the act of congress of April 24, 1820, provides, "that credit shall not be allowed for the purchase money on the sale of any of the public lands which shall

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be sold after the first day of July next, but every purchaser of land sold at public sale thereafter shall, on the day of purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land office a receipt from the treasurer of the United States, or from the receiver of public moneys of the district, for the amount of purchase money on any tract, before he shall enter the same at the land office," etc. Under the act of March 26, 1804, the public lands were sold upon credit.

The failure of the purchasers to pay the installments as they became due led to the passage of a number of acts extending the time for making payments. The credit system, however, does not appear to have been satisfactory, hence the act of April 24th, 1820, which requires the purchaser at private sale to produce from the proper authority a receipt for the purchase money on any tract before he shall enter the same at the land office. The recital in the patent simply shows that this provision has been complied with, and does not and was not intended to show that the patent was issued under the act of 1820. The evidence from the general land office introduced on the trial in this case clearly shows that the land was settled upon by Van Pelt as a homestead under the act of May 20, 1862, and that he afterwards commuted the same under the provisions of the various acts of congress on that subject by paying the double minimum price. Land thus obtained, however, is not liable to compulsory sale for debts contracted before the patent was issued.

This is conceded to be the law by the attorneys for the defendants, but they say that the right is a personal one to Van Pelt and can only be pleaded by him, citing *Forgy v. Merryman*, 14 Neb., 515. In the case cited one Merryman executed a mortgage upon his homestead before making final proof, to secure a *bona fide* debt. Afterwards he made final proof and received a patent for his land and thereafter executed a quit claim deed to one Robinson, who,

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as a defense to an action of foreclosure, set up the invalidity of the mortgage. The court held that as the maker of the mortgage did not attack it, that the grantee in a quit-claim deed who had taken his deed subject to it could not. But this rule does not apply when one is claiming as a grantee of the debtor who had an absolute title unaffected by any liens of the creditor. Thus, although a third party cannot interpose the defense of the statute of limitations, yet a grantee may set up an exception that his grantor might have done. *Dawson v. Calloway*, 18 Ga., 573. *Grattan v. Wiggins*, 23 Cal., 16. *Skidmore v. Romaine*, 2 Bradf., 122. *Taylor v. Courtney*, 15 Neb., 190. *Ford v. Langel*, 4 O. S., 465. Maxwell Pl. and Pr. (4th Ed.), 21. So the purchaser of a mortgagor has the same right to avail himself of the bar of the statute that the mortgagor would have had. *McCarthy v. White*, 21 Cal., 495. *Low v. Allen*, 26 Id., 144. *Coufman v. Sayre*, 2 B. Mon., 206. 2 Wash. R. P. (4 Ed.), 185. The same rule would seem to apply in favor of the grantee in a deed. That is, if the property at the time when the conveyance was executed was not subject to a lien or the grantor's debts, in other words was exempt, that exemption will continue in favor of the grantee and may be pleaded by him. As the debt in this case was contracted before the patent was issued, the land in question is not subject to compulsory sale on execution on a judgment recovered on such debt. The judgment is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	450
20	800
28	197

GEORGE W. LININGER ET AL., PLAINTIFFS IN ERROR,
V. NATHANIEL HERRON, SHERIFF, DEFENDANT IN
ERROR.

1. **Assignment: SALE: FRAUD.** The mere sale by a party of a stock of goods to a relative is not of itself a badge of fraud. While a transfer of a stock of goods by a debtor in failing circumstances to his mother and brother is attended with suspicion, from the facility with which a secret trust in favor of the debtor may be created, yet where it is clear that such transfer was made in good faith, upon a sufficient consideration, and not to hinder or defraud creditors, it will be sustained.
2. ———: **SALE TO RELATIVE OF ASSIGNOR.** Where a bill of sale of a stock of goods was made to the mother and brother of the debtor to pay debts owing by him to them, *Held*, That as against other creditors the grantees acquired only the right to have a sufficient amount of the goods sold to satisfy their claims, and the balance was a trust fund for the benefit of other creditors, and the grantees must account.

ERROR to the district court for Gage county. Tried below before BROADY, J.

L. W. Colby and Hazlett & Bates, for plaintiffs in error.

L. M. Pemberton, T. D. Cobbey, and Burke & Prout, for defendant in error.

MAXWELL, J.

In October, 1882, one J. B. Lininger, a son of Elizabeth Lininger and brother of George W. Lininger, the plaintiffs, was doing business at Wymore, in this state, and being in pressing need of money borrowed about \$3,000 from George, giving his note therefor payable in 90 days. To secure this note J. B. executed to his brother a chattel mortgage on his stock of goods at Wymore. This mortgage was not filed for record until the 5th day of February,

1883. Prior to February 1st, 1883, J. B. Lininger had borrowed from his mother the sum of \$1,800, upon which he was paying interest. Of this sum \$800 had been in his possession for several years while \$1,000 was a later loan. On the 1st day of February, 1883, J. B. Lininger executed to his mother a chattel mortgage upon his stock of goods to secure the sum of \$1,800. This mortgage was filed for record on the 5th day of February, 1883. On the 7th of February, 1883, J. B. Lininger executed a bill of sale to the plaintiffs of all the goods, merchandise, fixtures, and chattels mentioned in the schedule which was attached to the bill of sale, the consideration expressed in the bill of sale being the sum of \$5,000.

The plaintiffs by their agents then took possession of the store and goods and began selling the same in payment of the debts due the plaintiffs. Soon after this transfer the defendant, as sheriff of Gage county, levied a number of attachments, in the aggregate about \$3,000, in favor of creditors of J. B. Lininger, on the goods in question. The plaintiffs thereupon brought an action of replevin and recovered the possession of the property. On the trial of the action in replevin the court found the issues in favor of the defendant and that he had a lien by virtue of the attachment upon the property in question in the sum of \$3,385.38.

The principal error relied upon is, that the judgment is against the weight of evidence. There is no claim that the attaching creditors were induced to give J. B. Lininger credit upon the faith of his ownership of the property covered by the mortgage to George W. Lininger, and that if said mortgage had been filed for record they would not have given or extended credit to J. B. Lininger. This plea, in any event, would be available only to subsequent creditors who trusted him on the faith of the property in his possession. But that question does not arise in this case. Nor does the question of the validity of the chattel

mortgages arise, as they were canceled and the goods delivered to the plaintiffs before the levies under the attachments were made, and they are to be considered only for the purpose of showing the nature of the transaction. The only questions that properly arise in the case are, 1st, Whether or not the plaintiffs were *bona fide* creditors of J. B. Lininger; and 2d, Was the property transferred to them to hinder or defraud the creditors of J. B. Lininger?

Upon the first point it is sufficient to say that all the testimony tends to show that plaintiffs actually loaned to J. B. Lininger in the aggregate the sum of \$4,800. All but about \$400 of this sum was in cash, and none of it on the 7th day of February, 1883, had been repaid. The checks of G. W. Lininger on the Omaha National Bank in favor of J. B. Lininger for about \$2,600, and in favor of Lininger & Metcalf for about \$400 on a debt of J. B., due to them, are in the record. It also appears that at that time J. B. represented to his brother that his stock would invoice \$12,000 or \$15,000. The actual invoice of the stock taken about February 1st, 1883, was \$9,663.00 with notes and accounts to the amount of \$1,700, and as there seems to have been no considerable purchase of stock after the date of this transaction it is apparent that the representations were substantially correct. The amount of the debt to the mother is in effect admitted, and is clearly established by the proof, so that there is a sufficient consideration for the purchase.

2d. The mere sale by a party of his stock of goods to a relative is not a badge of fraud. *Copis v. Middleton*, 2 Madd., 410. *Wrightman v. Hart*, 37 Ill., 123. *Dunlap v. Bournonville*, 26 Penn. St., 72. *Kane v. Drake*, 27 Ind., 29. *King v. Russell*, 40 Tex., 124. If such sales were fraudulent *per se* it would be impossible for family connections to aid each other in case of financial embarrassment without danger of being placed in a false position and losing the entire sum loaned. Such a rule if adopted

could not fail to be productive of great hardship and injustice; and has nowhere, so far as the writer is advised, been accepted as the law. But where a debtor makes a transfer of his property to a relative for the purpose of paying or securing a debt alleged to be due such relative, the presumption of fraud is strengthened, for the reason that the transaction is between persons with whom a secret trust is most likely to exist. *Hanford v. Archer*, 4 Hill, 271. *Bumpus v. Dotson*, 7 Hump., 310. Yet where the proof shows that there was necessity for, or reasonable fitness and propriety in making the transfer—in other words that it was made in good faith upon an adequate consideration—the presumption of secret trust and intent to defraud will ordinarily be overcome. Each case must depend upon its own circumstances, and fraudulent intent being a question of fact, if it should be made to appear from the evidence that the object of a transfer of property was not to hinder or defraud creditors, it should be sustained. All the evidence in this case shows that the object of the transfer of the goods in question was to secure the debts owing the plaintiffs, and in such case the transaction will be sustained. *Lorton v. Fowler*, ante p. 224. *Polk v. Bierbower*, 17 Neb., 268. There is testimony in the record tending to show that the value of the goods did not exceed the sum of \$5,000 when the transfer was made. The invoice, however, shows the value to have been nearly twice that sum. This property was a trust fund for the payment of the debts of J. B. Lininger, and he could not as against creditors transfer a greater amount to the plaintiffs than sufficient to pay their claims. As to any excess, they hold the same as trustees for the benefit of creditors of J. B. Lininger.

While the plaintiffs have a claim upon these goods for the amount of their debts, other creditors also have rights in the premises that must be protected. It is evident that the value of the goods is nearly sufficient to pay all claims of

both the plaintiffs, and those in the hands of the defendant. As the plaintiffs by virtue of the bill of sale and possession have a prior lien on the goods to the attachment liens, their claims must be first satisfied, the remainder going to the defendant. The judgment of the district court is reversed and the cause remanded for further proceedings, the plaintiffs being required to account for the goods disposed of by them under the bill of sale.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	454
26	790
25	809
18	464
42	358

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V.
ERNEST SHUCHARDT, DEFENDANT IN ERROR.

1. **Criminal Law: FAILURE OF JURY TO AGREE ON VERDICT.**
The authority of a judge of the district court in the trial of a criminal case to discharge the jury in the event of disagreement, without the consent of the prisoner, can only be exercised after the jury have been in consultation for so long a time that there is no reasonable probability that they will agree.
2. ———: ———. Where a cause was submitted to the jury at 7 o'clock P.M., and the jury at 6 A.M. next day reported to the judge that they were unable to agree, and were discharged by him without the consent of the prisoner, or notice to him or his attorney; *Held*, That the discharge of the jury was unauthorized, and the prisoner was entitled to be released.
3. ———: ———. Where a jury in a criminal case is discharged for any of the causes mentioned in section 485 of the Criminal Code, the record must show the necessity for such discharge.

BILL OF EXCEPTIONS filed by district attorney under provisions of Sec. 515, Criminal Code.

Guy R. Wilbur and *W. F. Bryant*, for plaintiff in error.

T. M. Franse, for defendant in error.

MAXWELL, J.

At the November term of the district court of Cuming county the defendant was indicted for an attempt to kill one John Melder. A plea of not guilty was entered by the defendant, and a trial had, the cause being submitted to the jury on Saturday, December 1st, 1883, at about 7 o'clock P.M. About 6 o'clock on Sunday morning the jury reported to the judge that they were unable to agree, whereupon he discharged them, without notice to or the consent of either the defendant or his attorney, and in the absence of both. The journal entry in regard to the disagreement of the jury is as follows:

"And on this 2d day of December, said jury returned into court and reported that they were unable to agree, whereupon said jury were discharged by the court." The defendant filed a plea in abatement, setting up the above facts, and issue was joined thereon, and testimony taken. The court found the issues in favor of the defendant, and discharged him. A writ of error was allowed on the application of the district attorney, and the cause is now submitted to the court. The question for determination is, has the defendant been once in jeopardy? Sec. 485 of the Criminal Code provides that, "in case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is *no possibility of agreeing*, the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice to the prosecution." When a jury is impaneled the state must proceed with the prosecution. There can be no non-suit as in civil actions. If the accused cannot be convicted he is entitled to a verdict of acquittal. And if, after the jury has been sworn and the jeopardy thus begun, the court without sufficient cause discharges them, without a

verdict, this in law is equivalent to an acquittal. 1 Bish. Cr. Proc. (3d Ed.), § 821. *Wright v. State*, 7 Ind., 324. *Reese v. State*, 8 Id., 416. *Morgan v. State*, 13 Ind., 215. *People v. Barrett*, 2 Caines, 304. *McCawley v. State*, 26 Ala., 135. *Poage v. State*, 3 O. S., 229.

In the case cited last it is said (page 239): "That the power to discharge is a most responsible trust, and to be exercised with great care, is too obvious to require illustration." It is a discretion, said Mr. Justice Story, to be exercised only "under very extraordinary and striking circumstances." 2 Gall., 364. "The power," said the same judge, "ought to be used with greatest caution under urgent circumstances, which would render it proper to interfere." *U. S. v. Perez*, 9 Wheat., 579. "I am of the opinion," said Chief Justice Spencer, "that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of *extreme and absolute necessity*." *People v. Goodwin*, 18 Johns., 187. "That the discretion ought to be exercised in cases of mere disagreement only after a long effort of the jury to agree, and when there is no reasonable hope of their doing so, is well settled, and the reasons for the discharge ought to be stated in the record." *Id.*

In *Dobbins v. State*, 14 O. S., 499, it is said: "Counsel for the plaintiff very justly and necessarily concede that a case of necessity may exist which would legally justify the course taken in this instance; but they insist that such a case can only arise when some intervening impediment has necessarily stopped the progress of the first trial before verdict; that the power of discharging a jury in a criminal and especially in a capital case is a delicate and highly responsible trust, to be exercised on account of the disagreement of the jury only when they have deliberated so long as to preclude all reasonable expectation that they will ever agree upon a verdict without being compelled to do so from famine or exhaustion; that this

power does not rest upon the arbitrary or uncontrollable discretion of the judge presiding at the trial, but is a legal discretion, to be exercised in conformity with known and established rules; and finally, that unless the facts stated in the record clearly established a case of necessity, the discharge will operate as an acquittal of the accused, and preclude his further prosecution. Abating something from the claim made as to what must of necessity affirmatively appear in the record, we have no hesitation in yielding to these propositions our entire assent, and they are certainly very strongly supported by the cases cited in argument. *Hurley's Case*, 6 Ohio Rep., 402. *Mount v. The State*, 14 Ohio Rep., 304. *Poage v. The State*, 3 Ohio St. Rep., 238. *McKee's Case*, 1 Bailey's Rep., 651. *United States v. Perez*, 9 Wheat., 580. *People v. Goodwin*, 18 Johns. R., 187. *People v. Olcott*, 2 Johns. Cas., 301. *United States v. Coolidge*, 2 Gallis. R., 364. *People v. Barret*, 2 Caines' R., 304."

Where the jury are discharged for any of the causes stated in section 485 of the Criminal Code, the record must show the necessity which required their discharge, otherwise the defendant will be entitled to an acquittal. *Hines v. State*, 24 O. S., 134. *Poage v. State*, 3 Id., 229. *Hurley v. State*, 6 Ohio, 400. *Mount v. State*, 14 Ohio, 295. This was not done in this case.

It never was intended to permit a court arbitrarily to discharge a jury for disagreement until a sufficient time had elapsed to preclude all reasonable expectation that they will ever agree. The county should not be subjected to the expenses incident to a second trial where there is a reasonable probability that a verdict may be reached on the first, while the accused is entitled as a matter of right to a verdict in his favor, if after a full and careful consideration of all the testimony, and on comparison of views the jury should find that the charge was not established by the proof. In this case the jury was discharged

Mayer & Schurmann v. Zingre.

after being in consultation only eleven hours. The jury had not then deliberated for so long a time that there was no probability of their agreeing, and the court could not discharge them on that ground alone, without the assent of the defendant. The record shows that the court remained in session until the 6th of December, so that there was no necessity for the discharge. The judgment of the court below is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18 458
22 58818 458
27 37118 458
33 42118 458
35 48
35 34518 458
36 72318 458
48 86818 458
49 605
55 11918 458
59 604

**MAYER & SCHURMANN, PLAINTIFFS IN ERROR, V.
CHRISTINE ZINGRE, DEFENDANT IN ERROR.**

1. **Attachment: MOTION TO DISCHARGE.** When a motion to discharge an attachment for the reason that the facts stated in the affidavit are untrue, has been heard on affidavits in support as well as in resistance, decided thereon by the trial court, brought to this court on error, and it appears from an examination of such affidavits that there is a conflict of evidence, the order of the trial court will not be disturbed unless the preponderance of evidence against it is clear and decisive.

2.] —: **PETITION.** A cause of action in a petition upon a debt not fraudulently contracted, if coupled with a cause of action upon a debt which was fraudulently contracted, and an order of attachment covering both counts is issued upon an affidavit alleging that "said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought," *Held*, To vitiate such order of attachment and justify its discharge.

ERROR to the district court for Dodge county. Tried below before POST, J.

E. F. Gray, for plaintiffs in error, cited: 1 Bouvier

Dic., 436. 2 Id., 251. Chitty on Bills (13 Amer. Ed.), 516. Comp. Stat., Chap 41, § 1.

N. H. Bell and *W. H. Munger*, for defendant in error, cited: *Bowen v. True*, 53 N. Y., 640. *McGovern v. Payn*, 32 Barb., 84.

COBB, CH. J.

The plaintiffs sued out an attachment against the defendant in the county court of Dodge county upon an indebtedness consisting of a promissory note executed and delivered by the defendant to the plaintiffs for the sum of \$330.11, and a balance of account for goods sold amounting to \$51.09. The grounds of attachment as set out in the affidavit were: "That the said defendant has assigned, removed, and disposed of a part of her property with intent to defraud her creditors, and that said defendant is about to assign, remove, and dispose of a part of her property with the intent to defraud her creditors, and that said defendant has converted a part of her property into money with the intent to defraud her creditors and with intent to place it beyond the reach of her creditors; and that said defendant is about to convert a part of her property into money for the purpose of placing it beyond the reach of her creditors, and with intent to defraud her creditors; and that said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought."

The defendant moved in the said county court to discharge the said attachment upon affidavits filed with such motion. The plaintiffs filed affidavits in resistance; the motion was heard thereon and the court decided the same in favor of the defendant and discharged the said attachment. Thereupon the matter was taken to the district court of said county on error, was argued to said district court, by which the said judgment of the county court was affirmed. And thereupon the plaintiffs bring the cause to this court on error.

Although presented in several different ways, there is but one error presented, to-wit, that the district court erred in affirming the judgment of the county court dismissing the order of attachment.

Upon a thorough examination of the pleadings and affidavits, as well those in resistance as those in support of the motion, and the authorities cited on either side, in the consultation room, we all came to the conclusion that, so far as all the grounds for attachment as contained in the original affidavit, except the last one, are concerned, the same being denied by the defendant and her agent, the evidence is so evenly balanced and conflicting as to render the judgment of the trial court conclusive thereon. In respect to the last clause of the original affidavit, to-wit: "That said defendant fraudulently contracted the debt and incurred the obligation," etc., it is true that the same is in terms denied in the affidavits of the defendant, her husband, and son. Yet we do not think the denial sufficient in view of the affidavit in resistance of Ernest Schurman, one of the plaintiffs, who states in his said affidavit, "That September 17, 1883, the said Christine Zingre, defendant, was indebted to the plaintiffs for goods sold and delivered to her in the sum of \$330.11. * * * Said Jacob Zingre, as her agent, done and transacted all of the business in relation to her store, and personally kept the same, * * * and said \$330.11 being then due and payable, I asked said Jacob Zingre for payment, and thereupon said Jacob Zingre asked me for further time to pay the same, and to induce the affiant to extend the time of payment he represented in behalf of the defendant that her stock of goods in her said store was worth the sum of \$2,500, and that she owned twenty-two head of young cattle, worth \$500, and that she was not owing—outside of a debt of about \$900, secured by mortgage on her homestead—to exceed five hundred dollars, the largest part of which was due the plaintiffs, * * * and requested me to take her note for the

amount due in ninety days, and to continue to sell her goods, * * * and thereupon affiant, believing said statement and representation, and relying upon the same, did take the note sued upon in this action, and did sell and deliver to her the goods, the amount of which are set up in the second count of the petition herein," etc. This affidavit must have been taken as true, as it was not contradicted by any affidavit in reply, and while it may be doubted that the evidence was sufficient to establish the falsity of these representations in so far as they related to the amount and value of the stock of goods in defendant's store, it was sufficient to establish their falsity in regard to the amount of her indebtedness, and such representation being false was *prima facie* fraudulent. And a debt contracted or an obligation incurred by reason of and upon such false and fraudulent representations would doubtless be a proper foundation for an attachment. But it seems that the principal debt had been contracted and obligation incurred before these representations were made, and the only effect upon said principal debt that the said representations had was to induce the plaintiffs to consent to change it from an open account to a note at ninety days. Nevertheless, we are all of the opinion that it remained the same debt in the meaning of the attachment law, and that fraud to sustain an attachment must have existed at or before the time of its original contracting. Such fraud did exist at the time of the contracting of the debt, which still stands in an open account, to-wit, \$51.34, and upon it attachment would doubtless lie.

The only question which remains to be considered is, whether an attachment which has been issued on two causes of action, one of which is a proper and statutory cause for attachment, and the other of which is not, can be sustained. The framers of the statute seem to have recognized the process of attachment as a harsh remedy, and one which, though proper in a certain class of cases, should

be confined within strict and narrow limits. Hence they provided that an order of attachment should only be issued in any case after an affidavit has been filed, showing the nature of the plaintiff's claim, that it is just the amount which the affiant believes the plaintiff ought to recover, and the existence of some one of the grounds for an attachment enumerated in the preceding section. These, with other provisions, clearly indicate the purpose of the legislature to secure the people against unauthorized and excessive attachments. These provisions would afford no protection if a party holding a small claim, upon which an attachment might lawfully issue, may attach to it another claim, upon which, under the law, no attachment could be issued, and obtain an attachment for the consolidated and increased amount.

The New York cases cited by counsel for the defendant, in the absence of authorities to the contrary, are sufficient as authority, yet I think the reason why the attachment should be confined to the cause of action upon which an attachment may properly issue, and that the consolidating therewith, and thus increasing the amount of plaintiff's claim by the addition thereto of a cause of action, upon which, if standing alone, no attachment could lawfully issue, will vitiate the whole, is so plain and manifest as to render authorities to that effect of secondary importance.

The order and judgment of the district court are affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

LENA ASPINWALL, APPELLEE, v. OLIVER C. ASPINWALL, APPELLANT.

18	463
19	586
22	167
18	463
34	7
18	463
30	96

Final Order. An order in an action for divorce awarding the wife alimony and suit money *pendente lite* to be paid by the husband, cannot be taken by appeal or error to the supreme court before judgment or decree granting or denying a divorce.

APPEAL from the district court for Gage county. Heard below before BROADY, J.

L. W. Colby, for appellant.

R. W. Sabin, for appellee.

COBB, CH. J.

The plaintiff filed her petition and commenced her action in the district court of Gage county against the defendant for divorce and alimony for the several causes set out in her said petition. She also prayed for an order of said court to compel "the said defendant to pay plaintiff temporary alimony, sufficient for her support and that of her child, and the necessary conducting of said suit," etc.

The defendant made answer to the said petition denying his marriage with the plaintiff, and making other denials and admissions of facts stated in said petition. To this answer there was a reply denying all new matter.

On the 11th day of March, 1885, the said district court made an order in said cause: "That the defendant pay to the plaintiff or to R. W. Sabin, her attorney, the sum of \$300 in installments of \$100 each, on the first day of each and every month for the next three months, and the further sum of \$50 per month to be paid on the first day of each and every month, commencing on the first day of April next, until the further order of this court for the maintenance and support of the plaintiff and her child."

To this order the defendant excepted and brought the same to this court by appeal. The plaintiff filed a motion in this court to dismiss the appeal for the reason "That the order of the district court granting alimony *pendente lite* is not such a final order as can be appealed from the district court to the supreme court while the cause is still pending in the court below."

By an arrangement of counsel at the hearing, the motion and the questions presented by the appeal were argued together.

In natural order the motion must be first considered.

Section 675 of the code provides, "That in all actions in equity either party may appeal from the judgment or decree rendered, or final order made by the district court, to the supreme court," etc. The "judgment or decree" here referred to must be the final or main judgment or decree in the case, otherwise the definite article would not be used in stating it. But appeal also lies from a "final order made by the district court."

The action of the district court appealed from in the case at bar is clearly not the final or main judgment or decree in the case. The principal thing sought and litigated for in the action is a divorce, and no judgment or decree in the case can be considered final unless it either awards or denies such divorce. But is it a final order? If the statute above quoted stood alone it might be somewhat difficult to answer this question. Section 581 of the code provides that, "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." This definition of a final order was made in view of proceedings in error. But, it being the only statutory definition applicable thereto, it must be held also to

control as well when used in reference to proceedings by appeal.

A considerable portion of the brief of appellant is devoted to the argument of convenience. And, if addressed to the legislature, would, in the opinion of the writer, be worthy of very serious consideration. There the mischief complained of might be remedied by careful legislation, and made to apply to a limited and well defined class of cases. But even were it granted that this court possesses the power to extend by construction the class of orders which may be brought by appeal from the district courts, the exercise of such power would be to declare a general principle, which would necessarily be far-reaching in its effects, and necessarily tend to protract and complicate litigation, and that would certainly be progress in the wrong direction.

Under the above statutory definition then, the order appealed from, although it affects a substantial right in an action, it does not determine the action and prevent a judgment. It is not an order made in a special proceeding, but is one made in an action to which the general rules of equity apply, although in some respects limited by statute. Nor is it an order made upon a summary application in an action after judgment.

Having reached the conclusion that the order appealed from is not appealable as an order, it will not be examined on the merits.

The order of the district court is affirmed, and the cause remanded to said court for further proceedings in accordance with law.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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THE COUNTY OF OTOE, APPELLANT, v. AMELIA H.
MATHEWS, APPELLEE.

1. **Tax Sale.** County commissioners are authorized to purchase at tax sale for the use of their respective counties any real estate offered for sale, when the same remains unsold for the want of bidders. *Brown v. Otoe County*, 16 Neb., 394.
2. ———: **CERTIFICATE.** When such sale was made at the time required by law, but the tax certificate was not made until three months afterwards, the sale was held to be valid. *Ibd.*
3. ———: **REDEMPTION: FORECLOSURE OF TAX LIEN.** After the time for redemption has expired, a county having given the notice to the land-owner or occupant required by law may bring an action to foreclose the tax lien, and may include all delinquent taxes whether accruing before or after the sale. *Ibd.*
4. **Limitation against Tax Lien.** The statute of limitations does not begin to run against a tax lien until the title acquired by the tax deed has failed. *Ibd.*
5. **Foreclosure of Tax Lien.** In an action in the nature of equity brought to foreclose a tax lien the court will look to the statute and not to the assessment as the foundation of such lien, and will regard no defense or objection which goes only to the manner of assessing or levying such taxes, of advertising or conducting the sale, or the qualification of any officer or person performing any act or duty in respect to such assessing, levying, or sale.

APPEAL and cross-appeal from the district court of Otoe county. Heard below before POUND, J.

John C. Watson, for plaintiff.

Charles W. Seymour, for defendant.

COBB, CH. J.

Action was brought in the district court of Otoe county by the county of Otoe for the foreclosure of tax liens for the taxes of several years and upon the several parcels of

real estate situate in said county, as set out, specified, and described in the petition in said action. The defendant answered, setting up the several defenses hereinafter mentioned. A trial was had to the court, which found in favor of the plaintiff as to certain of the taxes in said finding and judgment specified, and rendered a judgment or foreclosure and sale thereon. But as to other of said taxes in said finding and judgment set out and enumerated, found for the said defendant, and adjudged that the plaintiff had no cause of action therefor.

Both parties appealed to this court.

The questions presented by the appeal of the defendant may be briefly stated as follows:

1. That the purchase of the defendant's land for delinquent taxes was not the corporate act of the county, but the act of the county commissioners, and was *ultra vires*.

2. That the county commissioners had no right to purchase the said property except in case of the same having been offered for sale and remaining unsold for want of bidders.

3. That the county cannot foreclose the lien in this case for the reason that at the time of the purchase of said lands for taxes the same had not been delinquent for one year.

4. That the notice does not truly state the time when the right of redemption would expire.

5. That the certificates were not signed by the county treasurer, but by his deputy, and not by him until long after the date borne by said certificates.

6. * * *

7. That all taxes five years old are barred by the statute of limitations.

8. * * *

9. The county cannot foreclose until the title fails.

10. From 1861 up to 1877 real estate could not be sold for taxes by foreclosure or any other way until the personal property of the owner had been exhausted.

11. The act of February 28, 1881, had no retrospective effect, etc.

Every one of the foregoing points were made and questions presented by the same counsel in the case of the same plaintiff against W. A. Brown. That case was disposed of at the July term, 1884, and is reported at pp. 394-8, 16 Neb., to which, and the opinion following the same on motion for a re-hearing, I refer rather than to re-write the same.

2. The plaintiff appeals from that part of the finding and judgment of the district court which is in the following words, to-wit: "And the court further finds that the state and county taxes for 1867 and 1869, and the city taxes for 1867, 1869, 1870, 1871, 1872, 1873, 1874, 1875, and 1876, alleged in plaintiff's petition herein against the premises described, are illegal and void and are no lien on said premises."

There is no evidence in the record that the defendant's property was taxable or that there was any effort upon the part of either the city or county to tax it prior to the year 1870. Accordingly so much of the above finding and judgment as holds that no lien exists against said real estate for taxes for the years 1867 and 1869, or either of them, must be affirmed. But in so far as the said finding and judgment is adverse to the lien of said plaintiff for the city taxes of the years 1870, 1871, 1872, 1873, 1874, 1875, and 1876 the same must be reversed. So far as can be ascertained from the record and the briefs of counsel the district court found against the said taxes for the reason that no oath of the city assessors for said years was produced in evidence. The statute in force at the date of these taxes provides that, "Taxes upon real property are hereby made a perpetual lien thereupon, commencing from the first day of March of the current year, against all persons and bodies corporate, except the United States and this state." Sec. 50, Chap. 66, Gen. Stat.

It will be seen by reference to section 26 of the chapter above referred to that under the law as it then stood the assessors had until the first Monday of April of each year in which to complete the assessment, while by virtue of the section above quoted the taxes on the property to be assessed became a lien thereon from the first day of the preceding month. It cannot be, then, that the statutory lien of unpaid taxes is founded upon the assessment. On the contrary such lien is founded upon the statute. To the end that the burden of taxation may be borne as nearly equal as possible by each piece of property in the political subdivision in proportion to its relative value, an assessment is provided for by an officer elected for that purpose. The law provides, among other things, that he shall take and subscribe a certain oath and attach it to the assessment roll. This is a duty which may be enforced by mandamus, and for the refusal or failure to perform which the law has probably provided an appropriate punishment. But does such failure dissolve the statutory lien which had already attached, or does it render the other acts of such assessor void, or even voidable. The valuation of taxable property is not permanently fixed by the assessor, but it serves as a basis for the action of the precinct assessors of the county when met as a board of equalization, as provided for by section 26 of the chapter in question, and of the county commissioners when constituting the county board of equalization, as provided for by section 27 of the same chapter. Every owner of private property within the state is chargeable with knowledge that such property is subject to annual taxation. If his property is over assessed, he may attend before these boards and obtain redress, and in cases of oppression doubtless the courts are open to him for relief. But he cannot stand idly by and when these proceedings have ripened into a sale of his lands for such taxes, and the purchaser has sought the aid of a court of equity for the foreclosure of his lien, come

into such court and be heard to plead a technical defense to such taxes.

Whatever may have been the holding of this court in cases where it has been sought in a purely legal action to enforce a tax title, or whatever might be the ruling in a direct proceeding against the officers charged with the duty of assessing, levying, or collecting taxes, while such proceedings are *in elimini*, based upon the failure of the assessor to take, subscribe, or return the oath prescribed by the statute, or upon other illegality in the proceedings, it is clear and well settled that in a proceeding in the nature of equity to enforce a tax lien the court will look to the statute, and not to the assessment, as the foundation of such lien, and will regard the amount of the taxes against the property in question as borne upon the books of the county as unalterably established.

That part of the judgment of the district court which is brought to this court by the appeal of the defendant is therefore affirmed, and that part of said findings and judgment which are appealed from by said plaintiff is reversed. The cause is referred to the clerk of this court to compute the amount due on the causes of action rejected by the district court, but not including any taxes for any year prior to 1870, and upon the coming in of the report of said clerk the decree will be modified in this court accordingly.

DECREE AS ORDERED.

THE other judges concur.

Roberts v. Adams County.

**JACKSON ROBERTS, PLAINTIFF IN ERROR, v. THE COUNTY
OF ADAMS, DEFENDANT IN ERROR.**

Taxes: WRONGFUL SALE BY TREASURER. Where the treasurer of a county sells lands for taxes which are not liable to taxation and upon which no taxes were due, the tax purchaser may recover from the county the amount paid by him with interest thereon.

ERROR to the district court of Adams county. Tried below before MORRIS, J.

R. A. Batty, for plaintiff in error.

L. J. Capps, for defendant in error.

MAXWELL, J.

The plaintiff presented an account to the board of county commissioners of Adams county for money paid by him for the purchase of lands for taxes at private tax sale, the land not being liable to taxation. The county commissioners rejected the claim. The plaintiff then appealed to the district court. On the trial of the cause the court found for the defendant and dismissed the action.

There are 49 counts in the petition, which, except in date, description of land, and amount, are substantially alike. The following is a copy of the 1st count:

"That on the 1st day of April, 1879, the county commissioners of said defendant did furnish to the assessor of Little Blue precinct what purported to be a list of the lands in said precinct subject to taxation; that said list erroneously contained the following described lands, to-wit: The north-west quarter of the south-west quarter of section eleven, township five, range nine west, 6th principal meridian, in Adams county, Nebraska; that said assessor did value said lands at \$160, and returned said valuation with other lands on the first Monday in June, 1879, to

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Roberts v. Adams County.

the county clerk of said defendant; that said county clerk extended the taxes of 1879 against said land as follows, to-wit, total, \$11.14; that on the 1st day of May, 1880, said taxes not having been paid, the same became delinquent, and said land was offered for sale by the treasurer of said defendant on first Monday in November, 1880, but the land was not sold on that day for want of bidders, and that on the 16th day of November, 1880, said plaintiff bought said lands of said treasurer at private sale for said delinquent tax of 1879, and paid said treasurer the sum of \$11.83 therefor, that being the amount of taxes and interest claimed to be due against said land by the treasurer of said defendant; that there was no tax due against said land at the time of said sale and purchase for the reason that said land at the time it was so assessed was land belonging to the general government of the United States, and not liable to taxation; that said lands were wrongfully placed upon said tax list by said defendant's commissioners and said defendant's assessor; that said lands were sold, upon which no tax was due at the time, and on account of the premises set forth as above, the defendant became liable to this plaintiff for the amount so paid by him as aforesaid, to-wit, the sum of \$11.83, with interest at the rate of twenty per cent per annum from the 16th day of November, 1880; that said lands were again wrongfully assessed for the year 1880, and the plaintiff, to protect his tax lien, paid to the defendant's treasurer, as subsequent taxes upon said land, on the 19th day of September, 1881, the sum of \$2⁸⁸/₁₀₀, and on account of the premises set forth as above the defendant is liable for said amount, with interest at the rate of twenty per cent per annum from said date. The plaintiff says that there is now due him from the defendant the sum of \$11.83, with interest at twenty per cent per annum from November 16th, 1880, and \$2.36, with twenty per cent interest per annum from September 19th, 1881."

A demurrer was filed to the 9th count, but no answer to any of them. The facts stated in the petition are thus admitted: It is thus conceded that the treasurer of Adams county sold lands for taxes to the plaintiff which were not taxable, and upon which no taxes were due.

Sec. 131 of the revenue law (Comp. Stat., Ch. 77) provides that, "When, by mistake or wrongful act of the treasurer or officer, land has been sold upon which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold," etc.

This applies to all cases where the sale was made by mistake or wrongfully. The theory of our revenue laws is that a purchaser at tax sale shall, if the tax title fails, recover the purchase money, with interest. Hence the right to enforce the tax lien by foreclosure. If, however, the lands were not taxable, so that the lien for taxes did not attach, and consequently no interest pass the purchaser, the county is required to return the money with interest. Honesty and fair dealing require that this should be done. A county no more than an individual should be permitted to receive and retain money obtained through a mistake of fact or wrongful act. The court below, therefore, erred in holding, as it must have done, that the petition fails to state a cause of action, and the judgment is reversed and the cause remanded, with leave to the county to answer the petition and for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

REBECCA ATKINS, APPELLEE, v. HENRY ATKINS AND
MARTHA IRENE COURTNEY, APPELLANTS.

1. **Dower of Non-resident.** Where a husband conveys lands in this state while his wife is a non-resident thereof, she has no dower interest in the lands thus conveyed. *Ligare v. Semple*, 32 Mich., 438, approved and followed.
2. **Divorce: CONVEYANCE BY HUSBAND TO DEFEAT ALIMONY.** Where a husband, while a divorce suit was pending, conveyed all his property to his daughter, the offspring of the plaintiff and defendant, the apparent purpose being to defeat a decree for alimony, *Held*, That the burden of proof was on the grantee to show a valuable consideration. *Lane v. Starkey*, 15 Neb., 285. *Gregory v. Whedon*, 8 Id., 377. *Savage v. Hazzard*, 11 Id., 327.
3. **Constitutional Law: REMEDY FOR CREDITORS.** Where an equitable right exists in favor of creditors the legislature may create a legal remedy in their favor that will operate upon existing judgments.

APPEAL from the district court of Lancaster county.
Tried below before POUND, J.

Mason & Whedon and *D. G. Courtney*, for appellants.

J. H. Foxworthy and *J. R. Webster*, for appellee.

MAXWELL, J.

The decree of divorce was affirmed in *Atkins v. Atkins*, 13 Neb., 271, but the alimony reduced from \$5,600 to \$3,000, and the allowance for attorneys' fees and expenses from \$2,000 to \$1,000. The alimony thus allowed, it seems, was not paid, and the decree not being a lien upon the lands of Henry Atkins the plaintiff was unable to collect the same. In 1883 the legislature passed "An act to provide additional remedies for enforcement and collection of judgments and orders for alimony or maintenance." Comp. Stat., Ch. 25, §§ 4a, b.

The first section provides that, "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or other action or process, as other judgments."

An execution was thereupon issued on the decree, and levied upon certain real estate as the property of Henry Atkins, but the legal title to which was in Martha I. Courtney. The plaintiff thereupon filed a creditor's bill to have the conveyance of said real estate to Mrs. Courtney declared fraudulent and void as against the plaintiff's rights. The court below found the issues in favor of the plaintiff, and rendered a decree accordingly.

Three questions are presented by the record: *First*. Has the plaintiff any dower interest in the lands in controversy? *Second*. Where a conveyance is made while an action is pending, the effect of which will be to defeat the judgment, on whom is the burden of proof of a valuable consideration? And, *Third*. May the plaintiff avail herself of a remedy created by statute after a decree in her favor?

Sec. 20 of chapter 23 of the Comp. St. provides that, "A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state, of which her husband *died seized*; and the same may be assigned to her or recovered by her in like manner as if she and her deceased husband had been residents within this state at the time of his death."

It will be seen that any woman residing out of the state is entitled to dower only in such lands of her deceased husband lying in this state as he was seized of at the time of his death. This section of the statute seems to have been copied from the statute of Michigan on that subject, the language being the same. The proper construction of the section was before the supreme court of that state in *Ligare*

v. *Semple*, 32 Mich., 438, and it was held that where a husband conveyed lands in that state while his wife was a non-resident thereof she was not entitled to dower therein. In our view this is the proper construction to be given to the language of the statute, and we approve of and adopt it. The plaintiff, therefore, being a non-resident of the state, had no dower interest in any of the lands conveyed by Henry Atkins.

Second. The testimony shows that Martha I. Courtney is the daughter of the plaintiff and Henry Atkins; that the property in question is all the property in this state, so far as is known, possessed by Henry Atkins, and the effect of the transfer is to defeat the plaintiff's decree for alimony.

Sec. 17, Chap. 32, Comp. Stat., declares every conveyance or assignment "made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, damages, forfeitures, debts, or demands," etc., void. Rights of alimony certainly are included in this provision. *Morrison v. Morrison*, 49 N. H., 69. *Chase v. Chase*, 105 Mass., 385. *Dawson v. Damon*, 28 Wis., 512. *Draper v. Draper*, 68 Ill., 19. *Turner v. Turner*, 44 Ala., 437. A transfer made while a suit is pending of all the debtor's property is merely a badge of fraud. It may be shown to be valid because the mere pendency of the suit does not make the transfer void. *Bump Fraud. Conv.* (3d Ed.), 37, 38. But where all the debtor's property is conveyed with the apparent intention on the part of the grantor to defeat a judgment about to be recovered against him, and these facts are known to the grantee, the burden of proof rests upon her to show a valuable consideration. *Baxter v. Septimus*, 3 Md., 334. *Spindler v. Atkinson*, 3 Id., 409. *Hunter v. Waite*, 3 Gratt., 26. *Crossley v. Elworthy*, L. R., 12 Eq., 158. *Wilson v. Buchanan*, 7 Gratt., 334. *Woolston's Appeal*, 51 Penn. St., 452. *Crumbaugh v. Kugler*, 2 O. S., 373. *Reynolds v. Lansford*, 16 Tex., 286. *Raymond v.*

Atkins v. Atkins.

Cook, 31 Id., 373. *Oliver v. Moore*, 23 O. S., 473. *Spence v. Dunlap*, 6 Lea, 457. It is the *bona fide purchaser* and not the innocent donee that is protected. Therefore the burden of proving a valuable consideration is on the grantee, when proof of that fact becomes necessary to her protection against those standing in the relation of creditors of the grantor. *Lane v. Starkey*, 15 Neb., 285. *Gregory v. Whedon*, 8 Id., 377. *Savage v. Hazzard*, 11 Id., 327. 1 Am. L. C. (4th Ed.), 53. *Battle v. Jones*, 2 Ala., 314. *Abbott's Tr. Ev.*, 448, 449. As Mrs. Courtney failed to introduce any proof on that point there is no evidence that she paid any sum whatever for the property.

Third. Remedies for the collection of judgments are largely within the control of the legislature, and if no vested right is destroyed such acts are valid. It will not be seriously contended that one holding property of a debtor as voluntary donee has any vested right to hold the same as against one holding a valid claim against the donor at the time the donation was made. The property in such case, to the extent of the creditor's claim against the debtor, is liable for the satisfaction of the same, and the legislature by providing a mode for subjecting property to the payment of the judgment merely provides for the more perfect administration of justice by the application of the property.

It is well settled that where an equitable right exists in favor of creditors, the legislature has the right to create a legal remedy in their favor. *Lewis v. McElvain*, 16 Ohio, 355. *Bolton v. Johns*, 5 Penn. St., 149. *Henderson v. Dickerson*, 17 B. Mon., 173. *Sempeyac v. U. S.*, 7 Pet., 222. The act in question, therefore, is valid, and the proceedings under it legal. It follows that the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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AUGUST G. MANSFIELD, APPELLEE, V. STEPHEN D.
AVERY ET AL., APPELLANTS.

Pleading: ANSWER. Where an answer puts in issue the truth of the material facts stated in the petition, a demurrer to the answer should be overruled.

APPEAL from the district court of Boone county. Heard below before TIFFANY, J.

Lamb, Ricketts & Wilson, for appellants.

Miller & Price, for appellee.

MAXWELL, J.

This action was brought in the district court of Boone county to have a mortgage of certain real estate in that county canceled of record and declared satisfied. It is alleged in the petition that the promissory note which the mortgage was given to secure "was duly paid, the debt discharged, and satisfaction of said mortgage entered upon the margin of the record thereof, in the words and figures following, to-wit:

"ALBION, July 26, 1873.

"Having this day received satisfaction for the within mortgage, I hereby cancel this mortgage.

"Signed,

W. H. PRESCOTT."

That "said satisfaction is insufficient in this, it is not attested by the county clerk or his deputy as a subscribing witness, as required by law." To this petition the defendant Prescott filed an answer, to which the plaintiff demurred, and the demurrer was sustained and a decree entered in favor of the plaintiff. The sole question presented is the sufficiency of the answer. The following is a copy thereof:

"Comes now the defendant W. H. Prescott, and for his separate answer to the plaintiff's petition herein filed says, that he admits that on the 15th day of October, 1872, S. G. Avery executed and delivered to this defendant a mortgage on the south-west quarter of section twenty-two of township number twenty north, of range number six west, situated in the county of Boone, and state of Nebraska, to secure the payment of the sum of one hundred and ninety dollars then due and owing plaintiff, as alleged in the petition; admits that said mortgage was duly recorded in the records of mortgages in said county of Boone, and state of Nebraska. This defendant denies each and every other allegation in said petition contained; this defendant further answering says, that he expressly denies that the said sum so due and owing the defendant from the defendant S. D. Avery, the payment of which was secured to this defendant by said mortgage, was paid to this defendant on the 26th day of July, 1873, or at any other time, and alleges the fact to be that the said sum so due and owing this defendant from said Avery, and secured by said mortgage, remains wholly unpaid, and the said Avery and the said mortgage are in equity, good conscience, and good morals still bound for the payment of said sum together with the lawful interest thereon; and this defendant further answering says, that he expressly denies that he ever released the said mortgage, denies that the signature attached to the pretended release of mortgage on the margin of the record thereof is the signature of this defendant; and this defendant alleges the fact to be that he did not sign his name to said pretended release on the 26th day of July, 1873, or at any other or different time, nor yet did he authorize, empower, instruct, or otherwise direct any person whomsoever to sign his name to said pretended release, and defendant further alleges that the handwriting of said pretended release and the name of W. H. Prescott written thereunder are not, nor yet either of them, in the

Mansfield v. Avery.

handwriting of the defendant, nor was the said pretended release or the name attached thereto written upon the margin of said record with the knowledge or consent or by procurement of this defendant; that the name of the defendant written under the pretended release of said mortgage on the margin of the record of said mortgage is a forgery of the name of this defendant by some person to this defendant unknown; and this defendant further says that he had no knowledge whatever of said pretended release or said forgery until after the bringing of this action. Defendant further alleges that it would be inequitable and obnoxious to good conscience and good morals to declare the said mortgage canceled, annulled, or removed as a cloud upon the title of said premises without payment to this defendant of the amount due and owing this defendant and secured to him by the said mortgage."

The answer states a defense to the action. It is denied therein that the note in question had been paid or the mortgage released, and it is alleged that the purported release of the same on the record was made without authority and is a forgery. For the purposes of the demurrer these statements must be taken as true and they put in issue the facts upon which relief is sought in the action. The judgment of the district court is reversed and the cause is remanded for further proceeding.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE L. SMITH, PLAINTIFF IN ERROR, V. HARRIET
I. JONES ET AL., DEFENDANTS IN ERROR.

1. **Partnership Property.** Real estate purchased by a firm with partnership funds, and for the use of the partnership, is the property of the firm although the conveyance be made to one of the parties.
2. ———: **INSOLVENT PARTNERSHIP.** The property of an insolvent partnership will be applied in the first instance to the payment of debts due the partnership creditors in preference to the creditors of the individual members of the firm.
3. **Assignment for Creditors.** An assignee for the benefit of creditors under a valid assignment may maintain an action to set aside a sale of real estate under an attachment levied after the execution and delivery of the deed of assignment, where such sale would impair or defeat his title as assignee.

ERROR to the district court for Seward county. Heard below before POST, J., sitting for NORVAL, J.

D. C. McKillip and *John H. Ames*, for plaintiff in error, cited: *Blake v. Graham*, 6 Ohio State, 583-4. Wade on the Law of Notice, § 204 and *et seq.* to § 213. *Ely v. Wilcox*, 20 Wis., 551. *Maul v. Rider*, 59 Pa. State, 167. *Chicago v. Witt*, 75 Ill., 211. *Bates v. Norcross*, 14 Pickering, 224.

Hastings & McGintie, for defendants in error, cited: *Ashton v. Jones*, 14 Neb., 426. *Sullivan v. Smith*, 15 Id., 477. *Burpee v. Smith*, Walkers Ch., 327. *Colby v. Brown*, 10 Neb., 413. *Drake v. Jones*, 27 Miss., 427. *Watkins v. Logan*, 3 B. Mon., 20.

MAXWELL, J.

A demurrer to the petition was sustained in the court below, and the action dismissed. The plaintiff appeals. It is alleged in the petition, in substance, that prior to the

Smith v. Jones.

14th day of October, 1880, Peter Hennegin and William Ashton were partners doing business at Seward under the name and style of "Hennegin & Ashton;" that prior to said date said firm had purchased and paid for with partnership funds certain real estate in Seward county, which is described, which real estate was purchased for and used by said partnership, but the legal title to the same was in Hennegin; that on 14th day of October, 1880, said firm was indebted in about the sum of \$5,000, and was unable to pay its debts in full, and the members of said firm were also individually insolvent and unable to pay their debts; that on said day said "co-partnership, by a deed of assignment duly signed, executed, acknowledged, and delivered to the plaintiff, duly assigned and conveyed to the plaintiff in trust for the benefit of the creditors of said co-partnership all and singular the goods, chattels, effects and property, lands and tenements of said co-partnership, including the real estate in question; that said firm was openly and notoriously in possession of said real estate until the time of said assignment, and since that time the plaintiff has been and now is in possession thereof, and that said assignment was duly recorded within thirty days from its date, etc.; that on the 15th of October, 1880, and after said deed of assignment had been executed and delivered to the plaintiff, the State Bank of Seward and others began actions by attachment against Peter Hennegin for his individual debts, and caused said attachments to be levied upon the real estate in controversy as the property of said Hennegin; that afterwards judgments were recovered in said actions and the property in question sold under the attachments to the defendants in this action, and "should said sales be confirmed by order of this court, and conveyance thereof be made to the purchasers of said property thereat, said property would all of it be conveyed by said purchasers to innocent parties, and be wholly lost to the plaintiff and the creditors of said partnership," etc. It is also alleged that

"Hennegin had absconded and abandoned said partnership business and property, and had ceased to act as a member of said firm long before the said 14th day of October, 1880, leaving the said Wm. H. Ashton the only remaining and acting partner of said firm, and that said deed of assignment was executed by said Ashton in the firm name of Hennegin & Ashton, alone and without the individual name or signature of said Peter Hennegin, so that the same does not purport of record to convey the above mentioned property, the apparent record of title of which is in said Hennegin individually, as aforesaid." The prayer is for an injunction and to have said sales set aside, and the application of the property to the creditors of the firm. It is well settled in this court that property purchased with partnership funds inures to the benefit of the partnership. *Catron v. Shepherd*, 8 Neb., 308. *Bowen v. Billings*, 13 Id., 439. And even if the title be taken in the name of one member of the firm, the property is that of the partnership. *Id.* And where the firm is insolvent the partnership property is primarily liable for the partnership debts. *Bowen v. Billings*, 13 Neb., 439. *Roop v. Herron*, 15 Id., 73. This is the general rule, and where a firm is insolvent its property is a trust fund for the benefit of its creditors. *Murray v. Murray*, 5 Johns. Ch., 60. *West v. Skip*, 1 Ves. Sen., 239. *Ex parte Ruffin*, 6 Ves., 119. *Campbell v. Mallett*, 2 Swanst., 551. *Young v. Frier*, 1 Stockt. Ch., 465. *Robbins v. Cooper*, 6 Johns. Ch., 186. *Ex parte Crowder*, 2 Vern., 706. *Ex parte Cook*, 2 P. Wms., 500. Parsons on Partnership, *pages 348, 349, and notes. The property in question, therefore, if the allegations of the petition are true, belonged to the firm, and should be applied in favor of the creditors of the partnership, and the attempt to apply it to creditors of one of the members of the firm is entirely unauthorized, and the sale should be set aside.

2. The right of the plaintiff to bring the action. In

England the courts seem to hold that primarily such assignments do not create a trust, nor clothe the creditors with the character *cestuis qui trustent*, but merely make the assignee an agent of the debtor to dispose of and apply the property under the debtor's directions. *Garard v. Lauderdale*, 3 Sim., 1. *Wahryn v. Coutts*, 3 Id., 14. *Acton v. Woodgate*, 2 M. & K., 492. *Brooks v. Marbury*, 11 Wheat., 78. In this country, however, it is generally held that a voluntary assignment for the benefit of creditors, if valid, is not a mere agency of the debtor, but creates trust relations, and the creditors are the beneficiaries. *Moses v. Margatroyd*, 1 Johns. Ch., 119, 129. *Shepherd v. McEvers*, 4 Id., 136. *Nicoll v. Mumford*, Id., 523. *Ward v. Lewis*, 4 Pick., 518. *N. E. Bank v. Lewis*, 8 Id., 113-118. *Pingree v. Comstock*, 18 Id., 46. *Read v. Robinson*, 6 W. & S., 329. *McKinney v. Rhoads*, 5 Watts, 343. *England v. Reynolds*, 38 Ala., 370. *Pearson v. Rockhill*, 4 B. Mon., 296. The assignee, therefore, can maintain an action to protect the trust estate. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

18 484
42 490

C. C. HOUSEL, PLAINTIFF IN ERROR, V. GEORGE THRALL, DEFENDANT IN ERROR.

1. **Commission Merchant.** A factor or commission merchant, while not a guarantor of the responsibility of the persons with whom he deals, is held to the same degree of care and diligence which a reasonably prudent man would exercise in the management of his own affairs.
2. ———: LIABILITY IN CASE STATED. Where a commission

Housel v. Thrall.

merchant in Omaha, doing business in San Francisco, caused commission goods to be consigned to another person in San Francisco, that person being one whom the consignor had stated to him he, the consignor, would have no dealings with, such commission merchant could not relieve himself from liability resulting from the loss of the consigned property, on the ground that the person to whom the goods were shipped was a sub-agent, for whose acts he could not be held responsible; and the fact that the goods were consigned to the objectionable person by the consignor would not change the application of this rule, it being shown that the commission merchant was purchasing other goods of the consignor at the same time, and causing them to be shipped to such person in the same way.

ERROR to the district court for Douglas county. Heard below before NEVILLE, J.

John L. Webster, for plaintiff in error, cited: *Story Agency*, § 201. *McCants v. Wells*, 4 S. C. (Rich.), 381. *Darling v. Stanwood*, 14 Allen, 504. *Commercial Bank v. Martin*, 1 La. Ann., 344. *Tiernan v. Commercial Bank*, 7 How., 648. *Daly v. Bank*, 56 Mo., 94. *Dorchester v. Bank*, 1 Cush., 177.

George W. Doane, for defendant in error, cited: *Story Agency*, §§ 13, 14, 452, 454. *Allen v. Merchants Bank of N. Y.*, 22 Wend., 215. *Montgomery Co. Bank v. Albany City Bank*, 3 Selden, 459. *Com. Bank v. The Union Bank of N. Y.*, 1 Kernan, 203. *Smedes v. Bank of Utica*, 20 Johns., 372. *Bank of Orleans v. Smith*, 3 Hill (N. Y.), 560. *Reeves v. The St. Bank*, 8 O. St., 465. *American Express Co. v. Haire*, 21 Ind., 4. *Wingate v. Meech's Bank*, 10 Pa. St., 104. *Borup v. Nininger*, 5 Minn., 417. *Thompson v. Bank of S. C.*, 3 Hills (S. C.), 77. *Tabor v. Perrot*, 2 Gall. (U. S.), 565.

REESE, J.

This action was instituted in the district court of Douglas county. The petition alleges substantially that plain-

tiff below, defendant in error here, employed defendant below, plaintiff in error in this court, who was a forwarding and commission merchant in Omaha, to forward to the city of San Francisco, in the state of California, and sell on commission at the highest market price for cash a certain quantity of lard of the value of \$694.72, and that plaintiff in error received the lard and undertook to forward and sell it in the manner agreed upon, and in consideration of the commission agreed to be paid, to exercise due care and diligence in the disposition of the lard, but that he did not use due diligence in that behalf; neglected to sell the lard in San Francisco, and without the consent of defendant in error shipped it to Nevada, and that he has failed to account for the same.

The answer denies the employment, the agreement, receipt of the lard, or that he shipped it to Nevada. Alleges that he had nothing to do with the matter, and hence was guilty of no negligence. It is also averred that at the time the lard arrived in San Francisco it had no market value, and was entirely worthless. The reply is a general denial of the allegations of the answer. The cause was tried to a jury, who returned a verdict for defendant in error. Upon the motion of plaintiff in error for a new trial being overruled, and a judgment being entered upon the verdict, plaintiff in error brings the cause into this court by proceedings in error for review.

By reference to the issues joined, as well as to the testimony introduced on the trial, it may be seen that defendants in error based their right to recover upon the allegation that they employed plaintiff in error personally to handle the property, and that they had no dealings with any other person in that behalf. This being denied by the answer, as well as by the testimony introduced by plaintiff in error, the question of fact thus presented was one for the jury to decide, under proper rulings and instructions of the court.

The errors assigned will be examined in the order in which they are presented by the brief of plaintiff in error.

It is insisted that certain instructions to the jury, as set out by the petition in error, were not applicable to the case as made by the testimony; that they had a tendency to mislead the jury, and for those reasons were improperly given. These instructions are as follows:

"You are instructed that the law holds a consignee in the conducting of the business of a consignor to the same degree of care and diligence which a prudent man would exercise in the management of his own business.

"You are instructed that a factor or commission man, while he cannot be held as a guarantor of the responsibility of the persons to whom he sells in the ordinary course of business, and in accordance with the usages of the market where the sale takes place, must, nevertheless, use all reasonable effort, and resort to all reasonably available sources of information, to learn the pecuniary liability of the purchaser, and if he does not do so, and any loss occurs by reason thereof, he will be liable for such loss."

It is true, as claimed by plaintiff in error, that instructions given to a jury must be applicable to the case as made by the testimony. But it is contended by defendant in error that the instruction is applicable to the testimony and was properly given.

The soundness of the law when applied to a proper case is not questioned. It therefore only remains for us to enquire whether or not it was applicable to the case at bar.

The action was against plaintiff in error as a commission merchant. The allegation is directly made that he undertook to use proper diligence in disposing of the consigned property, and that he failed to comply with his contract in that behalf. The testimony tends to show that when the matter was first talked of between the parties, plaintiff in error suggested the name of a

person in San Francisco with whom he had some business relations as a proper person to whom the property might be shipped, but that defendant in error refused to deal or have any business relations with him, and insisted upon dealing alone with defendant in error, and that this was understood between the parties to the contract. It is shown that the property was shipped to this person. It is true that plaintiff in error denied having had anything to do with the transaction, and in substance so testified. It is also true that defendant in error claimed, and testified in substance, that plaintiff in error was the only person with whom he dealt. Now if we could say that the theory of plaintiff in error was the correct one, then we could also say that the court erred in giving the instruction. But if the defendant's theory was the correct one then the instruction was proper. This question of fact had to be left to the jury, and in doing so it was necessary to so instruct as to state the law correctly applicable to the issue thus presented. *Severance v. Melick*, 15 Neb., 614.

Plaintiff in error requested the court to give the following instructions, which were refused:

"If the testimony satisfies the jury that Housel was doing business in Omaha, and that the lard in controversy was shipped to San Francisco, and was to be sold in San Francisco, and if the plaintiffs knew that Housel was not personally doing business in San Francisco, and that the nature of the business was such that it would be necessary for Housel to employ an agent in San Francisco to sell the lard, then the defendant Housel was authorized to employ a sub-agent in San Francisco to sell the lard, and Housel would only be bound to use ordinary care and diligence in the selection of such agent, and if any loss arose through the carelessness or fault of such agent then the defendant would not be liable in this action."

"If the jury believe from the testimony that Housel authorized the shipment of the lard on his (Housel's) account,

still the plaintiff cannot recover if at the time he knew the lard was to be shipped to San Francisco to be sold by George W. Forbes, as agent, with a knowledge on the part of plaintiff of who George W. Forbes was, as well as of his character and standing, and made no objection to the shipment of the lard to George W. Forbes to be sold by him as such agent. If the plaintiffs intended to hold the defendant Housel for any defalcation or misconduct on the part of George W. Forbes, and the plaintiffs were possessed of a knowledge of the character and standing of George W. Forbes, then it was the business of the plaintiffs to notify the defendant not to have said Forbes employed as a subagent to sell the lard in controversy."

"If the plaintiffs were possessed of a knowledge of the character and business standing of George W. Forbes, and knew that he was the agent to sell the lard in controversy in San Francisco, and the plaintiffs themselves shipped the goods direct to George W. Forbes at San Francisco, and in his name as consignee, then they cannot hold the defendant liable for the value of the goods in controversy on account of any misconduct of the sub-agent, George W. Forbes, unless the testimony further satisfies you that the defendant Housel was also guilty of negligence, and that such negligence on the part of Housel contributed to the default or misconduct of the said George W. Forbes."

The court over the objection of plaintiff in error gave the following instruction:

"If the jury believe from the evidence that Forbes was the agent of Housel, and not plaintiffs, to dispose of the lard in San Francisco, on commission, and that Forbes as said agent did not use due and ordinary diligence in disposing of the lard, and by reason thereof a loss accrued to the plaintiffs, the defendant is liable for such loss, and the plaintiffs are entitled to recover their damages sustained by reason thereof."

It will be seen that by the refusal of the court to give

the instructions prayed for by plaintiff in error, and the giving of the one last above quoted, the question of the subagency of Forbes as a defense was virtually withdrawn from the jury. It may be true that in a proper case the doctrine contended for by plaintiff in error is the law, and that the instructions refused should have been given. But whether it had any proper application to the case at bar is another and more difficult question. This difficulty arises out of the testimony in the case. It is insisted by defendants in error all through the record that they at all times informed plaintiff in error that they were not dealing and would not deal with Forbes; that they would have nothing to do with him in this transaction, and that if they shipped the lard it must be upon the credit of plaintiff in error, and that they would look to no one else for returns, and from a lack of confidence in Forbes they especially objected to having any business relations, either directly or indirectly, with him, and that plaintiff in error stated that he had \$2,600 of Forbes' money, and that he would be safe in sending the lard to Forbes to be sold for him, and would do so. If this is true, it would seem that the question of subagency, growing out of Forbes' employment, could have no place in the case. While it is true that plaintiff in error insisted upon the trial that this was not the case, yet in his cross-examination he substantially admitted the facts to be as claimed by defendant in error. From that part of his testimony referring to a conversation with Mr. Thrall, before the shipment was made, we quote as follows:

Q. Then you had a talk with Mr. Thrall in the street car.

A. Yes, sir.

Q. How long after Mr. Roddis had spoken to you?

A. I don't remember how long it was.

Q. Was it a few days or weeks?

A. Probably a week or so.

Q. In that talk that you had with Mr. Thrall in the street car you merely said something to him about wanting to see him about a matter of business that might be of interest to him.

A. I don't recollect that kind of a talk; if I had any business with him I would just as soon have told him in the street car as anywhere else.

Q. State if that talk in the street car was anything more than to the effect that you told Mr. Thrall that you wanted to talk to him about a matter of business that would be of interest to him, and wanted him to come to the office.

A. It is likely I did.

Q. Did he go to the office?

A. I think likely.

Q. You had a talk with him at the office.

A. Probably.

Q. Do you remember what time it was?

A. No, sir.

Q. Was it before any meats were ordered from Roddis & Thrall?

A. I judge it was.

Q. Did you say in that conversation something to him about Roddis & Thrall shipping meats to George Forbes on commission?

A. Only in answer to what Mr. Roddis had said to me.

Q. What occurred in that conversation between you and Mr. Thrall? In that conversation did you say anything to Mr. Thrall about shipping meats to Mr. Forbes, or shipping lard to Mr. Forbes on commission to San Francisco?

A. I don't think I did, unless it was for them to ship it on their own account.

Q. Did you say anything to them?

A. I don't remember.

Q. Did Mr. Thrall, when Mr. Forbes' name was men-

tioned, say to you in that conversation that that would end the question; if he was to ship to Forbes that he did not care to have any business with him?

A. I think very likely he said that.

Q. Don't you remember that he did say that?

A. I don't think but what he did say that, and I do not deny it. I think probably he did.

Q. Did you tell him what he testifies you did about Forbes having been misunderstood; that he came here from Montana with a large amount of money; that he had been in various kinds of business, and taken in by different persons?

A. I might have told him about Forbes bringing his money home the last time, I do not remember, etc.

By this it appears beyond question that prior to the consignment of the lard it was clearly understood that defendants in error were not willing to make consignments to Forbes, or have any dealings with him, and the evidence fails to show any agreement or contract by which it is made to appear that they had any dealings with him. The fact that they shipped the lard to "George W. Forbes, agent," argues nothing, since they were at the same time shipping to him other consignments of meat, etc., in the same way, which plaintiff in error had purchased. While it may be that plaintiff in error, by the usages of trade, or otherwise, had authority to employ a subagent, for whose acts he would not be responsible, if not negligent in the selection, yet after the declarations made by Thrall he could not then select the objectionable party and avoid the liability, even if he had such authority ordinarily in the usual course of trade. We therefore think the court did not err in refusing the instructions asked.

It is contended that the court erred in admitting certain letters, etc., in evidence. The first of these is a letter referred to in the record as exhibit "A." This letter was written by Forbes to plaintiff in error, and by plaintiff in

error delivered to defendants in error. It was written and received before the consignment was made. It suggests the sending of the lard on commission, and says, referring to defendants in error and others: "If those parties prefer to send lard on commission, let them send it, and say to them that you will handle it for five per cent commission," etc. This letter having been received by plaintiff in error and delivered by him to defendants in error was, to say the least, a circumstance tending to show that he considered himself as dealing with them, and interested in the transaction. The next is a postal card written in San Francisco, signed "C. C. Housel & Co., F.," acknowledging the receipt of the lard. It was written by Forbes, and was competent for the purpose of showing this one fact; the lard having been shipped to him with the knowledge of Housel. But the error in this matter, if it was error, was without prejudice, as no issue is made upon it, the receipt of the lard by Forbes not being disputed.

Certain other letters and correspondence were admitted over the objections of plaintiff in error, and of which complaint is made. These letters were written either by plaintiff in error to defendant in error, or by Forbes to plaintiff in error, and by him delivered to defendant in error. Coming as they all did from plaintiff in error, and each tending to throw some light upon the transaction, their admission was proper.

We are unable to perceive any prejudicial error in the record. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

B. & M. R. R. Co. IN NEB., PLAINTIFF IN ERROR, v.
YOUNG BEAR AND SHARP WAYNE, DEFENDANTS
IN ERROR.

Replevin: ANSWER. An answer in replevin containing an allegation that the property was not unlawfully detained by the defendant, nor was plaintiff entitled to the immediate possession thereof, states a defense and is not demurrable.

MOTION for rehearing of case reported in 17 Neb., 668.

REESE, J.

Plaintiff in error has filed a motion for rehearing, accompanied by an elaborate brief, which it is deemed proper to notice. As stated in the original opinion, the answers of the defendants contain the allegations that the property "was not unlawfully detained by him from said plaintiff, nor was the said plaintiff entitled to the immediate possession of the same, as claimed in said petition," etc. To this answer a demurrer was filed. This demurrer seeks to attack only a part of the answer, which is designated as the second count or part, which seeks to set up a lien under the salvage act of 1883. One of the answers referred to by the demurrer is stated in paragraphs; the other is not. The one demurrer is made to both answers. But the last paragraph of the demurrer is as follows: "The said answer and counts where specified do not state facts sufficient to show any right to said property on the part of defendants." This must be considered as attacking the whole answer. The language above quoted from the answer must be treated as a denial of the allegations of the plaintiff's petition. Although in the affirmative form it is a direct traverse of the essential allegations of the petition, viz., the unlawful detention and plaintiff's right of possession. This was sufficient to defeat plaintiff's recovery, without proof. It

would put the plaintiff to the proof of the averments of the petition thus attacked. *Ruth v. Ruth*, 12 Neb., 594. The demurrer was properly overruled. *Lewis v. Coulter*, 10 O. S., 451. *Trustees v. Odlin*, 8 Id., 293. *Moore v. Kepner*, 7 Neb., 291. *Mansfield v. Avery*, ante p. 478.

The fact that a right under the alleged lien was not well pleaded by the answer can make no difference, as such plea was not necessary. The same defense could have been made under the denial as under the allegation of special defenses, had they been properly alleged; the plaintiff being required to recover on the strength of his own title. *Richardson v. Steele*, 9 Neb., 486. *Hedman v. Anderson*, 8 Neb., 184. *Cool v. Roche*, 15 Id., 27.

The motion for rehearing is denied.

JUDGMENT ACCORDINGLY.

The other judges concur.

THE WESTERN HORSE AND CATTLE INSURANCE COMPANY, PLAINTIFF IN ERROR, V. WILLIAM SCHEIDLE, DEFENDANT IN ERROR.

1. **Insurance: TITLE TO PROPERTY INSURED.** A policy of insurance is *prima facie* an admission by the insurers of the title of the insured to the property embraced in the policy.
2. **Petition examined, and Held,** Good when assailed after verdict.
3. **Insurance: WAIVER OF PREMIUM.** An insurance company may waive the payment of the premium after it is due. And when it is provided in the note given for the premium that if the note be not paid at maturity the company shall have the right to cancel the policy, the failure to cancel it will be deemed a waiver of such right, and in case of loss payment will be enforced. And especially would this be true if payment of the premium was received (even after the loss and without knowledge thereof) and the money held until after suit brought.

18	495
35	576
18	495
37	473
18	495
44	748
18	495
147	749
18	495
56	480

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Webster & Stewart and Charles Ogden, for plaintiff in error, cited: *Johnson v. Van Epps*, 14 Ill. App., 214. *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn., 174. *Mutual Benevolent Association v. Hoyt*, 46 Mich., 478. *Rombach v. Reid and Atl. L. Ins. Co.*, 35 La Ann., 234. *Smith v. Ross*, 51 Mich., 117. *Davis v. German Ins. Co.*, 135 Mass., 255. *Schoneman v. Ins. Co.*, 16 Neb., 406.

A. K. Webster, for defendant in error, cited: *Joliffe v. Madison Ins. Co.*, 39 Wis., 111. *Phoenix Ins. Co. v. Lansing*, 15 Neb., 495. *Schoneman v. Ins. Co.*, 16 Neb., 406, and cases cited.

REESE, J.

This cause was tried in the district court upon the following stipulation or agreed statement of facts:

"1st. That on the 5th day of June, 1883, the defendant issued and delivered to plaintiff its policy of insurance, No. 6858, the same being hereto attached marked 'A' and made a part of this stipulation, insuring plaintiff against loss on one sorrel gelding in the sum of \$125.00, and on one bay horse, \$75.00.

"2d. That plaintiff gave his note for the premium, said note being hereto attached marked 'B' and made a part of this stipulation.

"3d. That before the expiration of said policy of insurance, but after said premium note was due and unpaid, defendant placed said note in the hands of an attorney for collection. That said attorney gave plaintiff notice that said note was in his hands for collection, which notice is hereto attached marked 'C' and made a part of this stipulation.

"4th. That on the 15th day of March, 1884, the plaintiff paid said note and interest thereon to said attorney, and said attorney remitted the same to the defendant within one week thereafter less collection fees, and that plaintiff did not disclose to said attorney the fact that the said sorrel horse had died on the day previous.

"5th. That said sorrel gelding died on the 14th day of March, in the afternoon of said day, about three o'clock P.M., and without fault or neglect on the part of this plaintiff.

"6th. That plaintiff gave the defendant notice of said loss as soon as he could find the agent of said company, and within six days after said loss.

"7th. That more than forty-five days before the commencement of this action plaintiff gave defendant proof of said loss on blanks furnished by defendant as required in said policy.

"8th. That said horse, said sorrel gelding, was of the value of \$150.00; that defendant refused to pay the sum of \$125.00, and has not paid the same nor any part thereof.

"9th. Plaintiff has performed all other conditions of said policy by him to be kept and performed, except as negatived by this stipulation.

"10th. It is further stipulated that after defendant was served with summons, and before this cause was tried in justice court, defendant tendered the premium paid by plaintiff for insurance on said sorrel gelding from the time said note was due to the expiration of said policy to plaintiff, with interest and costs to that date thereon, and is now ready to pay the same, and brings the same into court and makes said tender good.

"The above are stipulated to be the facts of the cause so far as competent or material.

"Signed, &c."

It is not necessary to set out copies of exhibits attached to the stipulation, further than to say the note referred to

as exhibit "B" is a negotiable promissory note with condition that in case of loss the note should become due and be deducted therefrom; and that in case of the non-payment of the note at maturity "the company shall have the right to cancel the policy, but at their option may revive it after full payment of principal, interest, and charges have been made."

The court found in favor of defendant in error, whereupon a motion for a new trial was made upon the grounds that:

"1st. The pleadings of the cause will not support a judgment.

"2d. That upon the issues joined defendant is entitled to a judgment for costs, and that plaintiff's action be dismissed.

"3d. Because judgment was rendered in favor of the plaintiff, whereas upon the pleadings and facts defendant was entitled to judgment upon the law and issues joined.

"4th. Because the court admitted the stipulation of facts to be considered in evidence, to which defendant at the time objected and excepted because the petition of plaintiff did not entitle him to adduce any evidence in the cause."

This motion being overruled and judgment entered, plaintiff in error seeks a review.

There are two principal and decisive questions in this case, to-wit: *First*, Whether or not the petition is sufficient to sustain the judgment; and, *Second*, If so, whether the defendant in error could rightly recover under the stipulated facts.

The petition alleges in substance that defendant is an incorporated insurance company. That on the 5th of June, 1883, in consideration of the covenants performed by the plaintiff it issued and delivered to him the insurance policy, a copy of which is attached to the petition. That the gelding horse insured in said policy for \$125.00 died on the 14th day of March, 1884, and that said death was not

caused by the fault, neglect, or procurement of the plaintiff in the action, and that of all of which defendant, plaintiff in error, had due notice. That on the 28th of March, 1884, proof of loss was served on the company, and that the horse was worth \$150.00, and that plaintiff has kept all the conditions of the policy which he was required to keep and perform. That defendant company has not paid and will not pay the said sum of \$125.00, nor any part of it, to his damage in that sum. The answer admits the incorporation of the company and the issuance of the policy as alleged, and denies all other allegations.

The objections to the petition will be noticed in the order presented by the brief of plaintiff in error, the first of which is, that there is no allegation that at the time of the issuance of the policy the defendant in error was the owner of the horse insured or had any interest in him. The policy is attached to the petition and its recitals are made a part of it. In this policy it is said that the company does insure William Scheidle against loss by accident, etc., to the property described. This showed the interest of defendant in error. *Ins. Co. v. Slaughter*, 20 Ind., 526. The mere fact of the contract of insurance being effected should, we think, be enough *prima facie* to prove the ownership of the property. If the contract was procured by fraud, and such ownership did not exist, or if the insurance was simply a wager policy, it was proper matter of defense, and if relied upon should be pleaded as a defense. The same may be said of the second objection, that it is not alleged that defendant in error was the owner of the horse at the time of his death.

The third objection is, that it is not alleged that any consideration was given for the issuance of the policy. We think it is substantially so alleged. It is alleged that the policy was issued in consideration of the covenants performed by the plaintiff, and the policy itself, which is embodied in the petition, shows upon its face and acknowledges the payment of the premium.

The fourth and fifth objections are, that there is no averment that payment has been demanded or that any sum is or has been due plaintiff on the policy. As to the demand, it would seem clear that the proof of loss "on blanks furnished by defendant's agent," with the allegation that plaintiff in error "would not pay said sum of \$125 nor any part thereof," is a sufficient allegation of demand if such allegation were necessary. While it is true that the petition was not drawn with that degree of care usually deemed necessary by a careful and skillful pleader, yet we think it fully appears from the petition that the amount claimed is due. The contract is set out at length. The allegation of compliance with its terms on the part of defendant in error, the failure of plaintiff in error to pay, and the damage resulting is stated. The objection being made for the first time after judgment, the petition will be upheld if by any reasonable construction it is found sufficient. Other objections of a general nature are made to the petition, but upon an examination of all the allegations it is deemed sufficient.

The next question presented is as to the right of defendant in error to recover upon the facts as agreed to in the stipulation; the note given for the premium not having been paid until after the death of the insured property.

By reference to the note, a copy of which is attached to the stipulation, it may be seen that the non-payment of the amount for which it was given does not terminate the policy, the provision being as follows: "If this note be not paid at maturity the company shall have the right to cancel the policy, but, at their option, may revive it after full payment of principal, interest, and charges has been made." By this provision it is apparent that the vitality of the policy did not necessarily depend upon the payment of the note. Plaintiff in error had the right, if it so elected, to terminate the contract of insurance, but in order to do so an affirmative act upon its part was necessary.

So long as it insisted upon the payment of the note and declined to cancel the policy, so long its obligations continued. Had suit been brought upon the note its collection could not have been successfully resisted. The policy continued in force until canceled. It never was canceled. The right to cancel was waived. *Schoneman v. Ins. Co.*, 16 Neb., 404, and cases there cited. Also *Heaton v. Ins. Co.*, 7 R. I., 502. *Goit v. Ins. Co.*, 25 Barb., 189.

It is insisted that the payment of the note to the attorney in whose hands the note was placed for collection, without making known to him the fact of the death of the property, was an act of bad faith, and that the tender of the money back, after suit brought, should relieve the company from any liability. To this it may be answered, the note matured on the 27th day of July, 1883, and plaintiff might have terminated its liability had it seen proper to do so. The note was paid on the 15th day of March, 1884. Notice and proof of loss was given and made more than forty-five days before the commencement of this action, yet plaintiff in error held the money until after the commencement of the action, thus treating the contract of insurance as binding until the service of summons.

It may be, and is perhaps true, that the loss hastened the payment of the note, yet the payment not being essential to the life of the policy, its payment or non-payment would not change the rights of the parties.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1886.*

PRESENT:
HON. SAMUEL MAXWELL, CHIEF JUSTICE.
" M. B. REESE, } JUDGES.
" AMASA COBB, }

JULIA ABBOTT AND BROWN & RYAN BROTHERS, PLAINTIFFS IN ERROR, V. ALONZO ABBOTT ET AL., DEFENDANTS IN ERROR.

1. **Fraud.** The representation of a fact in the future, and not a mere promise which has been acted upon and turns out to be false, will entitle the injured party to the same remedies as fraudulent misrepresentations of an existing fact.
2. **Lien of Attorney.** An attorney is not entitled to a lien before judgment upon a cause of action for tort, which in case of case of the death of the parties would not survive.

ERROR to the district court of Lancaster county. Tried below before MITCHELL, J.

* NOTE.—Decisions herein published as of this term, are cases argued and taken under advisement at July Term, 1885, and filed prior to Jan. 8, 1886, when, under the constitution, Judge Maxwell became Chief Justice.—REP.

Brown & Ryan Brothers, for plaintiffs in error.

Lamb, Ricketts & Wilson, for defendants in error.

MAXWELL, J.

This case is presented to the court upon two petitions in error upon separate orders of the district court, one of which denied the right of Julia Abbott to reinstate the case, and the other the right of Brown & Ryan Brothers to an attorney's lien and to intervene. The action was originally brought by Julia Abbott to recover damages of the defendants for "colluding, conspiring, and confederating together to injure the plaintiff, and to alienate and estrange from plaintiff her husband, and to deprive her of the society of her husband, and to cause plaintiff to lose her home, and to bring her and her good name into disrepute," etc. Then follows a statement of the alleged acts causing the injury. This petition was filed in December, 1883. Answers were filed in March, 1884, and notice of an attorney's lien in April of that year. In May, 1884, the plaintiff dismissed her action in vacation. Afterwards, in April, 1885, she filed a motion supported by an affidavit to reinstate the case. In her affidavit she states in substance that the defendant Abbott, through an agent, promised to convey to her a house and lot worth at least \$1,000, that her husband, the father of her child, and son of the defendant, should live with her again; that the defendant would furnish her money as she needed it; that her husband did reside with her until after the case of the *State v. Alonzo Abbott* was tried, when her husband left her and has continued to remain away ever since. She also alleges the failure of the defendant to comply with any of the conditions upon which the dismissal was made, etc. She further states "that relying alone upon the above promises I signed the stipulations above referred to."

There are other material allegations to which it is unnecessary to refer. For the purposes of this motion we must consider the allegations of the affidavit as true, and so considered, sufficient is shown to require the court to reinstate the case. While fraud cannot be predicated upon a mere promise not performed, *Perkins v. Lougee*, 6 Neb., 220, yet, where a party through misrepresentation and fraud has gained an advantage in the action, a court of equity in a proper case will grant appropriate relief; and this, even if the advantage was obtained by fraudulent promises in the nature of the assertion of facts which there was no intention to perform—that is, where the representation is that of a fact in the future and not a mere promise, and it is relied upon, and turns out to be false, the remedies of the injured party are the same as where fraudulent misrepresentations are made in regard to existing facts. *Cho-teau v. Goddin*, 39 Mo., 229. *Vanderpool v. Brake*, 28 Ind., 130. *Bridgway v. Morrison*, Id., 201. *Davidson v. Young*, 38 Ill., 145. *De Beil v. Thompson*, 3 Beav., 469. *Bold v. Hutchinson*, 20 Id., 250. The court, therefore, erred in overruling the motion to reinstate.

2. The right of Brown & Ryan Brothers to intervene and assert their attorney's lien. No case was cited by them on the argument holding that an attorney had a lien prior to the recovery of judgment in a cause of action for tort which in case of the death of the parties would not survive; and in our view no such lien exists. We must hold, therefore, that they have no right to intervene. The court, therefore, did not err in overruling their motion. The order as to Julia Abbott is reversed and the cause remanded to the district court with directions to reinstate the case in her favor, and as to Brown & Ryan Bros., the order of the court below is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	506
46	84

THE STATE, EX REL. JOHN LYTLE, V. COMMISSIONERS
OF DOUGLAS COUNTY.

Mandamus: CONSTITUTIONAL LAW. On an application for a mandamus against the county commissioners of Douglas county to compel them to call an election in the city of Omaha for twelve justices of the peace therein, there being six precincts, and alleging that the act reducing the number of justices in such city to three was unconstitutional and void, *Held*, That the court would not in that proceeding determine whether or not the act was in contravention of the constitution. .

ORIGINAL application for mandamus.

Patrick O'Hawes, for relator.

No appearance for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the county commissioners of Douglas county "forthwith to call an election for the city of Omaha, for the purpose of electing two justices of the peace for each precinct in said city." The application was filed and submitted on the 29th of October, 1885, the day of election being the 3d of November thereafter.

The relator alleges that he is an elector of the city of Omaha; that in October, 1869, the board of county commissioners of Douglas county divided said city of Omaha into six precincts numbered respectively one, two, three, four, five, and six, which precincts as thus constituted still exist; that under the statute of 1879 each of said precincts is entitled to elect two justices of the peace, making twelve in all for said city; that by an act approved March 5th, 1885, it was provided that in cities of the first-class, which includes Omaha, but three justices of the peace shall be

elected in and for such city and no more; that by virtue of said act the defendants "were required to divide said six precincts constituting the city of Omaha into three districts for the purpose of and intending thereby to decrease the number of justices of the peace in said Omaha to the number of three, which said defendants, as their duty was, proceeded to do," etc.; that so much of the statute above referred to as relates to justices of the peace is contrary to and in derogation of the constitution of the state, section 15 of Art. X. of which provides, that the legislature shall not pass local or special laws "regulating county and township officers, providing for the election of officers in townships, incorporated towns and cities," and "in all other cases where a general law can be made applicable, no special law shall be enacted." Also section 19, Art. VI., which provides, "that all laws relating to courts shall be general and of uniform operation, and the organization of such courts severally shall be uniform." It will be seen that the questions presented in this case are very important, involving as they do the validity of an act reducing the number of justices of the peace in Omaha. Such questions should not be decided without a full hearing of all parties interested, and a careful examination of the entire subject. Less than this would not justify the court, in a case of this importance, in rendering a decision. Yet, on the eve of an election, with many other important cases pressing on our attention, this case was submitted, practically without argument, and we are asked to determine whether or not the act reducing the number of justices in Omaha to three is constitutional. We cannot dispose of the case in this summary manner.

In *State v. Stevenson*, ante p. 416, Judge Mitchell intervened and stated facts showing that he was exercising the duties of an important office which affected the public and the rights of individuals, and asked the court to determine the validity of the act creating the office. Abundant oppor-

tunity had been given all parties to present the case to the court and elaborate arguments were made, and briefs filed. The court, therefore, was possessed of all the points relied upon by either party; but that is not the case at bar. The presumption is that the legislature has done its duty, and that an act passed by it is not in conflict with the constitution, and it is the duty of all ministerial officers to obey it until the act is declared invalid. The writ must be denied.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	508
39	520
18	508
53	761

WILLIAM H. WHITALL ET AL., PLAINTIFFS IN ERROR, V.
MARK S. CRESSMAN, DEFENDANT IN ERROR.

1. **Deposit of Funds into Court: INTEREST.** Where money was paid into the district court in satisfaction of a decree and for distribution, and an appeal taken to the supreme court, where the order of distribution was changed, *Held*, There being no order of the district court requiring the money to be put out at interest, that a party entitled to a portion of the funds, and who had obtained the same, was not chargeable with interest thereon; but for money to which he was not entitled, he was chargeable with interest.
2. **Costs: RETAXATION.** A party complaining of the taxation of costs in the district court must file a motion in that court to retax the same. The ruling on the motion to retax is subject to review.

ERROR to the district court for Cuming county. Tried below before CRAWFORD, J.

John D. Howe, for plaintiffs in error.

Lamb, Ricketts & Wilson, for defendant in error.

MAXWELL, J.

This case grows out of that of *Cressman v. Whitall*, 16 Neb., 592, the cause being remanded to the district court for the entry of a new decree in accordance with the views expressed in the opinion. The district court thereupon rendered a decree as follows :

“ This cause coming on to be heard on the motion of the above-named defendants, for an order of the court to file the mandate of the supreme court herein and for the entry of a decree thereunder as therein commanded ; said order and decree to be entered as of the term of the court said mandate was received and as the date of the same appears to have been filed by the clerk of this court, which said motion, after arguments by counsel, is hereby sustained. The court, after being fully advised in the premises, finds that the defendants, William H. Whitall, John D. Howe, and Richard F. Stevenson, received of said fund the sum of six thousand six hundred and fifty-six dollars and eighty-three cents, of date December 22, 1883, and that they are properly chargeable with seven per cent interest thereon from date of receipt up to November 19, 1884, when decree was ordered entered by the supreme court allowing certain defendants amounts therein stated, amounting to \$419.29, which, with principal, amounted \$7,076.12.

“ The court further finds that on said nineteenth day of November, 1884, the said Howe and Stevenson were entitled to retain of said fund so as aforesaid found in their possession, the sum of \$5,799.36, due thereon, and their clients, to-wit : Howe and Stevenson, \$2,800 ; Eliza B. Gavit, administratrix of the estate of Nelson Gavit, \$2,986 ; William H. Whitall, \$18.26. That after deducting the above amounts there remained in the hands of Howe and Stevenson and Whitall, on November 19, 1884, the sum of \$1,276.76, which amount they are required to pay to the

clerk of this court; that the defendants, the West Point Manufacturing Company and the West Point Butter and Cheese Association, still retain of said fund the sum of \$500, which, with interest at 7 per cent from December 22, 1883, should be paid into court.

"It is therefore ordered, adjudged, and decreed by the court that the defendants, William H. Whitall and John D. Howe and Richard F. Stevenson, pay into court the sum of \$1,276.76, and that execution is awarded therefor; that the West Point Manufacturing Company and the West Point Butter and Cheese Association pay into court the sum of \$543.75; that on their failure so to do that the plaintiff is authorized to enforce the judgment lien in favor of William H. Whitall, and against the said West Point Manufacturing Company and the West Point Butter and Cheese Association in the case of *Romig et al. v. The West Point Manufacturing Company et al.*, and it is further ordered that the residue of said fund be disbursed in the manner following: That \$1,200 of the residue be held to await the order heretofore entered herein; that the residue of said fund be at once paid over to the said plaintiff, together with the \$1,200, if the same remains unclaimed under the order heretofore entered herein, or shall be awarded said plaintiff on further proceedings, as provided by the order heretofore entered herein; and that the plaintiff have and recover his costs, taxed at \$....., of, from, and against William H. Whitall, and that Howe, Stevenson, Gavit, or their attorneys, who received and retained out of said fund the several amounts so as aforesaid found due thereon, are required to file receipts with the clerk of this court for the several amounts so received and retained," etc.

The principal objection made by the plaintiff in error to the decree is the item of interest of \$419.29 for the use of \$6,656.-83 from December 22d, 1883, to November 19th, 1884, as it is claimed a considerable part of this money belonged to the parties named, and they should not be required to pay

Whitall v. Cressman.

interest on their own money. The directions of this court as to what the decree should contain is found in *Cressman v. Whitall*, 16 Neb., 600. It is there stated that the sum of \$2,800 was to be paid to Howe and Stevenson, and the money found due the Gavit estate, less the deduction of \$746, was to be paid to the agent or attorney authorized to receipt therefor. That \$1,200 was to be held for further proof of ownership, and that the remainder was to be paid to plaintiff (together with the \$1,200) if not awarded to the estate of Blair or his assignees.

There was no order of the district court that the money be put out at interest, and so far as the record discloses the money was simply held by the parties named, awaiting the order of distribution. This being so, a party should not be required to pay interest on *his own money*. The court awarded them certain sums. This money was theirs, and if they had not had the use of the money they would have been entitled to interest on the same; but as to those funds to which they were not entitled, interest will be charged at seven per cent. Some question is raised as to certain costs, but so far as appears no motion to retax has been filed, and a ruling had thereon by the lower court. This is necessary in order to review the proceedings on error. *Wood v. Colfax Co.*, 10 Neb., 556. *Linton v. Housh*, 4 Kas., 536. The decree of the court below will be modified in this court to conform to this opinion, and as thus modified it is affirmed.

JUDGMENT ACCORDINGLY. •

THE other judges concur.

STATE, EX REL. F. W. MATTOON, V. THE REPUBLICAN
VALLEY RAILROAD COMPANY.

Railroads: DUTY TO MAINTAIN STATIONS. Under the provisions of the constitution and statutes relating to railroads, where a railroad is built through a town of fifteen hundred or more inhabitants, and it is *necessary* to have a station at that place, the corporation may be compelled to erect the same with the necessary side tracks, notwithstanding it has a station at the junction of that and another line one and one-half miles distant.

REHEARING of case reported 17 Neb., 647.

Burke & Prout, for relator.

Marquett & Deweese, for respondent.

MAXWELL, J.

An opinion was filed in this case in July, 1885, which is reported in 17 Nebraska, 647. A motion for a rehearing was filed on behalf of the defendant, and was sustained, and the case has since been reargued and again submitted. The facts are stated in the former opinion and need not be repeated here. It is claimed on behalf of the corporation that section 72 of the act providing for the incorporation of railroads authorizes the corporation to determine its own termini, and necessarily where its track shall be laid between the points named. Probably the construction of that section contended for, within reasonable limits, is correct, but the question is not involved in this case, as the company has actually laid its track through the city of Blue Springs. No question therefore arises under section 72.

In the defendant's brief it is said that, "the rights and powers given by the laws of Nebraska, commencing at section 72 on page 195 of the Compiled Statutes, under what is known as our charter, with all the rights and privileges

conferred by that general law, and those which may be fairly implied, as well as those which are expressly given, became a contract with the state and the respondent railroad company."

"We admit that the legislature under our constitution has a right to modify this contract in some respects, but it cannot go so far as to interfere with vested rights."

No one will seriously contend that the legislature or the courts can interfere with vested rights. But has a railroad company any vested rights under our constitution and statute to refuse to make a station and the necessary side tracks and buildings at a point on the line of its road between the places of the termini where it is *necessary* that there should be such a station? In order to determine this question it will be necessary to refer to a few of the sections of the constitution and the statute.

Section 1, Art. XI. of the constitution requires every railroad corporation doing business in the state to maintain a public office for the transaction of its business, where transfers of stock shall be made, etc., and requires those having control of the road to make an annual report, etc.

Section 2 provides that the rolling stock and movable property shall be liable to sale on execution.

Section 3 prohibits the consolidation of parallel lines, etc.

Section 4 declares railways to be public highways, and "free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law," etc.

Section 5 prohibits the watering of stock, and requires sixty days' notice of a proposed increase of stock.

Section 6 authorizes the taking by the legislature of the property and franchises of incorporated companies, when necessary.

Section 7 requires the legislature to "pass laws to correct

abuses, and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state," etc.

Section 7 limits the exercise of the right of eminent domain to corporations organized under the laws of this state. Other duties are imposed on the legislature in regard to the control and supervision of railroads, to which it is unnecessary to refer.

The several sections of the statute referred to in the defendant's brief must be construed subject to the above provisions of the constitution.

Section 72 of the general railway act provides that "any number of natural persons, not less than five, may become a body corporate, with all the rights, privileges, and powers conferred by, and subject to all the restrictions of this subdivision." Comp. Stat., Chap. 16.

Section 73 provides what the certificate shall contain and its form, and where to be filed.

Section 74 confers corporate power on the corporation "to do all needful acts to carry into effect the objects for which it was created," etc.

Section 75 provides that "such corporation shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a railroad, with single or double tracks, with such side tracks, turn-outs, offices, and depots as *shall be necessary*, between the places of the termini of said road, commencing at or within, and extending to or into any town, city, or village named as the termini of said road, and construct branches from the main line to other towns or places within the limits of this state."

The above section is the one under which the defendant claims it has a vested right to locate stations at such points as it pleases. In view of our constitution it is unnecessary to discuss in this connection the public character of railroad corporations. That is very fully considered in the able and well-considered opinion heretofore filed in this

case by Judge COBB. By the terms of the statute the corporation is required to construct such side tracks, turn-outs, offices, and depots as shall be necessary.

In case of a contention between the public to be benefited by a station and the company in regard to the necessity of a station at any given point, the question becomes one of fact, to be ultimately determined from the evidence by an impartial arbiter—a court—although the legislature may provide the necessary rules and procedure for the determination of the matter. Being, therefore, a question of fact to be determined from the evidence, the court has jurisdiction in the premises and may inquire into the necessity for a station at the point indicated. That such necessity exists in this case, is fully shown by the evidence referred to in the former opinion. The railroad is built directly through the town—the property of its citizens taken for right of way, but no station at that point. It is said, however, that there is a station on the main line running east and west at Wymore, a town about one and a half miles away, and which has been built up since the construction of the road through Blue Springs. But that does not accommodate the people of the place last named and those that do business there. Suppose a railroad should run through the city of Omaha or Lincoln, and refuse to establish a station in the city, but did establish one a mile and a half beyond—would the court not have power to require the corporation to put in a station in either of these places upon it appearing that it was necessary to do so? That a station within the city would be necessary in such cases will be conceded; yet such a case differs only in degree from the one at bar. Here is a city of the second class, with fifteen hundred inhabitants, the center to a considerable extent of grain and stock shipments and of trade. Its business is not accommodated by the facilities of a rival town some distance away. We hold, therefore, that where a railroad is built through a town, particularly if of the size of Blue Springs,

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the railroad company must establish a station at that point whenever there is a necessity for the same. We adhere to our former decision, granting the writ.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	516
27	424
18	516
28	747

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD
v. BROWN COUNTY AND JOHN STALEY, TREASURER.

1. **Revenue in Unorganized Counties.** Brown county was created in March, 1883, being attached to Holt county under the general statute for election, judicial, and revenue purposes. In June, 1883, the county commissioners of Holt county levied state, county, and school taxes upon the property in Brown county. In July, 1883, an election was had for county officers, and officers elected, who qualified and entered upon the duties of their office. In April, 1884, the F., E. & Mo. V. R'y Co. paid to the treasurer of Holt county the taxes levied by the county commissioners of that county on the railroad in Brown county; *Held*, That the taxes should have been paid to the treasurer of Brown county.
2. **New Counties: ORGANIZATION.** Upon the organization of a new county, and the election and qualification of its officers, the ligament which bound to the county to which it was attached for election, judicial, and revenue purposes is severed, and all business must thereafter be transacted with the new county.

ORIGINAL application for injunction.

H. C. Brome and Joy, Wright & Hudson, for plaintiff.

William H. Munger, for defendants.

MAXWELL, J.

This is an action to restrain the treasurer of Brown county from collecting from the plaintiff certain taxes levied

by the commissioners of Holt county on the property of the plaintiff in Brown county, in the year 1883. The cause is submitted on the following stipulation:

It is hereby stipulated and agreed by and between the above named parties that the above cause be submitted to the court upon the following statement of facts and conditions:

1. That plaintiff is a corporation duly organized and incorporated under the laws of the state of Nebraska, owning and operating a line of railroad from Fremont, in the state of Nebraska, north-west through the counties of Dodge, Cuming, Stanton, Madison, Antelope, Holt, and Brown, in said state, with a road-bed, tracks, side tracks, depots, right of way, bridges, and such other property necessary and used in the construction and use of said railroad, and plaintiff was such a corporation and owned said railroad at the various times hereinafter mentioned.

2. That the county of Holt, in said state of Nebraska, is a corporation duly organized and created under and in pursuance of the laws of said state, and was such corporation at the various times hereinafter mentioned.

3. That the defendant, the county of Brown, is now one of the counties of said state organized under and by virtue of the provisions of the act of the legislature of the state of Nebraska, which took effect September, 1873, entitled "An act to provide for the organization of new counties, and to locate the county seats thereof," and amendments thereto, and found in article II., chapter 17, of part I., of the Compiled Statutes of Nebraska. That said county of Brown did not become permanently organized until the 23d day of July, 1883, and the officers elected at the first election therein did not qualify until the 7th day of August, 1883.

That in pursuance of said act of said legislature last aforesaid, the governor of the state of Nebraska, on the 18th day of March, 1883, appointed commissioners to call

an election in said county for the purpose of electing county officers in said county and determining the location of the county seat therein. That said election was called by said commissioners and held on the 19th day of July, 1883, and the same was the first election ever held in said county, and the votes cast at said election were canvassed on the 23d day of July, 1883, and the officers elected at said election did not qualify until the 7th day of August, 1883. That the defendant John N. Staley is now the treasurer of said county of Brown.

4. That the boundaries of what is now the county of Brown were fixed by an act of the legislative assembly of the state of Nebraska in the year 1883, which took effect February 19, 1883, and all of said territory included in said boundaries by said act was named and entitled the county of Brown.

5. That said territory embraced and included in said county of Brown, as now organized, was situated directly west of said county of Holt, said county of Holt being in the year 1883, and for several years prior thereto, duly organized; the said territory now embraced in said county of Brown was by virtue of the laws of the state of Nebraska attached to the county of Holt for election, judicial, and revenue purposes, and the county authorities of said county of Holt, under the provisions of said statute, exercised control over, and their jurisdiction extended to all the territory embraced in what was afterwards Brown county.

6. That under and by virtue of the provisions of the act of the legislature of the state of Nebraska, approved March 1, 1879, found in Compiled Statutes of Nebraska, in article I. of chapter 77, part I., the proper accounting officers of plaintiff, on or about April 7, 1883, listed and returned to the auditor of public accounts of said state for assessment and taxation the property of said plaintiff, as provided by section 39 of said statute, which report and return showed the number of miles of said railroad in each

organized county of the state, and the total number of miles of its railroad in the territory which now comprises the county of Brown. That said return disclosed that said company had 57.36 miles of railroad in the county of Holt, then organized, and that it then had in the territory which has since become (but not then organized) the county of Brown 51.70 miles of said road.

That in pursuance of the provisions of section 40 of said statute last aforesaid, after said return was made by the plaintiff to the auditor of public accounts, the state board of equalization of said state of Nebraska returned and assessed the value per mile of said railroad of plaintiff so returned to said auditor; and on or before the 15th day of May, 1883, the said auditor certified to the clerk of said county of Holt the assessment per mile of said state board on said railroad, and the said mileage of said railroad in Holt county and in said territory which now comprises the county of Brown, and said assessment of said railroad in Holt and in the territory now comprising the county of Brown was received by said county clerk of Holt county from said state authorities for taxation, the said territory embraced in what is now the county of Brown being then still attached to Holt county for revenue purposes.

7. That the county commissioners of the county of Holt, on the 14th day of June, 1883, and while said county of Brown was still attached to said county of Holt for revenue purposes and unorganized, duly levied taxes upon all of the taxable property in said county of Holt, and upon all of the taxable property included in said territory which now comprises the county of Brown, including taxes upon the assessment made by said state board upon plaintiff's railroad in said county of Holt and in said territory now comprising the county of Brown; and all assessments made for said year 1883, upon all property for taxation in Holt county and in the territory now embraced in the county of Brown (excepting the plaintiff's said railroad assessed by

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said state board) were made by assessors elected or appointed in said Holt county. That the said county commissioners of the county of Holt, in making said levy of taxes for the year 1883, levied a state tax of $6\frac{1}{8}$ mills, a county tax of 14 mills, and school taxes (certified up to the county clerk of Holt county by the several district boards) upon the assessed valuation of the plaintiff's road in Holt county, and in the territory attached thereto as Brown county, as well as on all other taxable property therein.

That the total taxes thus levied by the county commissioners of Holt county on the assessed valuation of plaintiff's railroad in said territory now comprising the county of Brown amounted to the sum of \$7,141.01.

That the said taxes thus levied by the commissioners of Holt county on the plaintiff's railroad in the territory now embraced in Brown county were carried out on the tax books of Holt county against said plaintiff's property, and the same delivered to the treasurer of said Holt county for collection as by law provided, with the warrant thereto signed by the county clerk of said county, commanding the treasurer of said county of Holt to collect the same as by law provided.

8. That on or about the 24th day of April, 1884, the said taxes so levied by the county of Holt on the plaintiff's said property in the county of Holt and in the territory now comprising the county of Brown being due, and said tax list being in the hands of the treasurer of said Holt county for collection, the plaintiff paid into the treasurer of Holt county on said day, in good faith, but with notice of the permanent organization of said Brown county, said taxes so levied against the said railroad in Holt county and in said territory now embraced in the county of Brown, and paid all taxes assessed and levied on its property for the year in said territory aforesaid, and received a receipt from said treasurer of Holt county therefor.

9. That the county authorities of Brown county never

at any time levied any taxes whatever upon any property in said county of Brown for the year 1883, and never levied any tax for said year on said railroad of plaintiff in said county of Brown, and said county of Brown was not organized at the time when by law the counties in said state of Nebraska are required to levy the taxes, but the taxes on all the property subject to taxation in said territory now comprising the county of Brown were levied by the proper authorities of Holt county.

10. That immediately after the permanent organization of said Brown county, and in the month of August or September, 1883, the county clerk of said county of Brown obtained from the tax books of Holt county a transcript of the said tax list or tax roll for said year 1883 of the taxable property within said Brown county, including the said property and railroad of this plaintiff, and filed the same in the office of the treasurer of said county; the said tax list being the taxes levied and carried out on plaintiff's property by the county authorities of Holt county aforesaid. And said transcript of said tax lists so obtained by said county clerk of Brown county from said Holt county is claimed by said Brown county to have been done under section 13, article II., chapter 17, part I., page 172, Compiled Statutes of Nebraska.

The foregoing are the facts with regard to the matters therein stated and agreed to as such by the parties to this action, and in addition thereto the plaintiff claims:

That the county of Brown never made any claim or asserted any right to any tax upon plaintiff's said railroad for said year 1883 before plaintiff paid the same to said county of Holt, but on the contrary disclaimed any right to receive or collect the same from plaintiff before plaintiff paid said taxes to said county of Holt, and the plaintiff paid said taxes without any knowledge or notice of any claim thereto on the part of said Brown county.

Which proposition defendants deny. And it is agreed

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by the parties hereto that if the court shall be of the opinion that said statement of facts as last above stated, and to which said parties do not agree, is material to a proper determination of this case, then the said parties may take evidence in the manner of taking depositions upon said question, and the truth of said statement be determined by the court from such evidence, said depositions to be taken within such time as the parties shall agree upon or the court direct.

The said parties, from the foregoing facts, submit for the judgment of the court the following:

First. Did the taxes levied by Holt county upon the property of the plaintiff within the territory now comprising the county of Brown for the year 1883, belong to the revenue of Brown county?

Second. If so, did the payment of said taxes in full by plaintiff to the treasurer of Holt county on the 24th day of April, 1884, discharge plaintiff's liability for said taxes to Brown county?

Third. Under the agreed facts is plaintiff now liable to said Brown county for said taxes of 1883, levied as above stated and paid by plaintiff to Holt county?

FREMONT, ELKHORN & MO. VALLEY R. R. Co.

By JOY, WRIGHT & HUDSON, *Attorneys.*

W. H. MUNGER, *Attorney for Brown County.*

Section 146 of chapter 18, Comp. St., provides that, "all counties which have not been organized in the manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county directly east for election, judicial, and revenue purposes," etc.

Section 147 provides that, "the county authorities to which any unorganized county or territory is attached shall exercise control over, and their jurisdiction shall extend to, such unorganized county or territory the same as if it were a part of their own county."

Section 1, Art. II. of Chap. 17, provides that, "when it shall be made to appear by the affidavit of three resident freeholders in any one of the unorganized counties of this state that such county contains a population of not less than two hundred inhabitants, and ten or more of such inhabitants being tax payers, may by memorial petition the governor to appoint three persons therein mentioned to act as special county commissioners, and one person by them named to act as special clerk for such county, and shall also name some place centrally located in the county for a temporary county seat, whereupon it shall be the duty of the governor to appoint and commission the persons so named for special county officers, and shall by appointment under his hand and seal declare the said place the temporary county seat of said county."

The second section requires the officers thus appointed to take an oath. The third requires the commissioners to divide the county into precincts, and to fix the time and places where an election will be held, and cause notices thereof to be given—the notices to specify the places of voting. The fourth section provides the mode of conducting the election. The fifth to the twelfth, inclusive, relate to the county seat. The thirteenth section provides that, "whenever any county organized under the provisions of this chapter shall have been previously attached to any other county for election, judicial, and revenue purposes, it shall be the duty of the county clerk chosen at the first election, after having qualified according to law, to procure from the proper officer of such county a transcript of all deeds, mortgages, judgments, and liens of *every description* upon real or personal property lying and being in such newly organized county, and cause the same to be recorded in the proper offices of his own county; such clerk shall be at full liberty to take such transcripts himself, and when recorded in the proper office in his own county shall stand headed with the name of the county and offices where taken,

and a certificate attached thereto that they are correct, and such clerk shall receive for his services ten cents per folio for taking such transcripts, ten cents per folio for recording them, and ten cents per mile in going after and returning with them, which shall be audited, allowed, and paid to him by his own county.

Section fourteen provides, "that county and precinct officers elected at the first election as herein provided shall continue to hold their respective offices until the next general election held for the same offices in other counties, as provided by the election law in force at that time, and until their successors are elected and qualified." The third section provides for the election of county and precinct officers.

It will thus be seen that the attachment of an unorganized county to one that is organized for election, judicial, and revenue purposes is merely of a temporary character, nor need the relation continue longer than sufficient time to organize after the unorganized county contains two hundred inhabitants and ten tax payers. The unorganized county does not become a part of the organized one but for certain purposes therein named is placed under its care.

The object evidently was to protect life and property in the unorganized county and prevent a failure of justice. For the purposes named in the statute—election, judicial, and revenue, the organized becomes as it were a trustee for the unorganized, and this relation continues until the proper officers are elected and have qualified in the new county—in other words, until the unorganized county becomes organized and the officers elected at the first election have taken the oath and given the security required by the statute. The new county then has provided the machinery for county government and put the same in motion. It is now able to transact its own business, and it would seem both unjust and unreasonable to deny it and its citizens the right. Being an organized county the ligament that

bound it to the former county is severed by the force of the organization, and it takes its place as one of the counties of the state, and its officers become amenable to the law for the faithful performance of their duty. The county clerk of the new county is to obtain "a transcript of all deeds, mortgages, judgments, and liens of every description upon real or personal estate lying or being in such newly organized county." While this language in terms, perhaps, does not include tax liens, yet we think they were intended to be included, otherwise it would have been unnecessary to provide for the election of a county treasurer. Why provide a treasurer if the tax rolls are not to be placed in his possession and the revenue collected and disbursed by him upon warrants properly drawn? It is evident, therefore, that the transcripts referred to include the property assessed and taxes levied in the new county. This being so, after the organization of the new county is complete and its officers have qualified, all taxes due to it are to be paid to its treasurer, and a payment to the treasurer of the county to which it was formerly attached is not a payment to it. The fact that the taxes were levied by the commissioners of the former county under a special power, gives that county no authority to collect such taxes if in the meantime such special power has ceased, as the object of the statute is not to enable the organized to make the unorganized a source of revenue.

It is clear, therefore, that upon the organization of Brown county and the qualification of its officers, that it became an organized county and the special authority of the county officers of Holt county ceased. A payment, therefore, after that date to the treasurer of Holt county of taxes due to Brown county for 1883 upon property lying therein, was not a payment to Brown county and not a valid payment of said taxes. Such taxes being paid under a mistake, in justice should be repaid to the plaintiff or offset against other taxes due from the plaintiff. But that question is

not in this case. The injunction must be denied, and the treasurer of Brown county permitted to collect from the plaintiff the taxes in question.

JUDGMENT ACCORDINGLY.

THE other judges concur.

EQUITABLE LIFE ASSURANCE CO., PLAINTIFF IN ERROR,
v. SAMUEL M. BROBST, DEFENDANT IN ERROR.

1. **Insurance: AUTHORITY OF GENERAL AGENT.** Where the general agent of a life insurance company employs an agent to solicit risks, the company will be bound by the contract of employment unless the person employed had notice of private restrictions upon the authority of such agent.
2. ———: **EVIDENCE CONFLICTING ON AGENCY.** If the employment is admitted, but it is claimed that it was entered into by the general agent in his own name and for his benefit; where the evidence is conflicting the question must be submitted to the jury and its finding will not be set aside if sustained by sufficient evidence.

ERROR from Adams county. Tried below before MORRIS, J.

R. A. Batty, for plaintiff in error.

Capps & Cliggitt, for defendant in error.

MAXWELL, J.

This action was brought by the defendant in error against the plaintiff to recover for his services in soliciting risks of life insurance for the society. He states in his petition that he was employed by an agent of the company

and had rendered services of the value of \$350, on which there was a credit of \$25.00.

The insurance company in its answer alleges that W. W. Craine, with whom the contract was made, "is the agent of the defendant for all of its business of the north-west; that said W. W. Craine receives a commission on all of said business coming through his office; that said W. W. Craine has not or ever did have any authority to appoint agents for the defendant. The defendant denies that said plaintiff was ever employed by W. W. Craine as the agent of the defendant, but alleges the truth to be that plaintiff was employed as the agent of W. W. Craine with the express understanding and agreement that he should have no claim on the defendant. It is also alleged that one E. W. Connor, who assisted the plaintiff below in securing the premiums, was not the agent of the insurance company, but was employed by Craine.

On the trial of the cause the jury returned a verdict for \$325.00 and interest in favor of the plaintiff below, and judgment was rendered on the verdict. Exceptions were taken by the insurance company to a number of the instructions given and for the refusal to give certain instructions, but no reference is made thereto in the brief filed by its attorney and the errors, if any, will be considered waived. The only question, therefore, for consideration is, does the evidence sustain the verdict?

The testimony tends to show that in February and March, 1882, W. W. Craine employed the plaintiff below to solicit risks of life insurance; that in pursuance of such employment he did go to Hastings to solicit insurance, and in connection with Mr. Connor, who was sent by Craine to assist him, policies to a large amount were issued, the first premiums on which amount to \$2,000 or more; that this money was all paid to Connor, who it is claimed sent the same to the company, and that Connor paid the plaintiff below \$25, which is all the compensation he received.

All the testimony shows that the plaintiff below rendered the services, and that a fair compensation would be the sum claimed. Was Mr. Craine the general agent of the insurance company? And if so, did he on behalf of the company employ the plaintiff below?

All the testimony tends to show that Craine was the general agent of the company. The rule is well settled that the acts of a general agent with reference to the subject of the agency will bind his principal, although he may have received private instructions narrowing his authority, unless such instructions are known to the party dealing with him. *Furnas v. Frankman*, 6 Neb., 429. *Johnson v. Jones*, 4 Barb., 369. *Bryant v. Moore*, 26 Me., 84. *Davenport v. P. M. & F. Ins. Co.*, 17 Iowa, 276. *Cross v. Huskins*, 13 Vt., 536. *Hatch v. Taylor*, 10 N. H., 538. *Cruzan v. Smith*, 41 Ind., 288. *Cosgrove v. Ogden*, 49 N. Y., 255. *Bradford v. Bush*, 10 Ala., 386. *Hunter v. Janeson*, 6 Ired. L., 252. Whether Craine had private instructions or not of which the plaintiff had notice was a question for the jury, and having been found in favor of the plaintiff below the verdict will not be disturbed. The question as to the special employment of the plaintiff below by Craine was properly submitted to the jury, and in our view the verdict in that regard is correct. The claim that the plaintiff below was to render his services for the experience he would acquire in the business is not very plausible nor probable, and it is not surprising that the jury found against it. It is evident that justice has been done and the judgment is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PETER W. ROSE, PLAINTIFF IN ERROR, V. AMOS PECK,
DEFENDANT IN ERROR.

Offer to Confess Judgment: costs. In a case pending in the district court an offer made by defendant to allow judgment to be taken by the plaintiff in a certain amount therein stated and costs, which offer was in writing and filed in the office of the clerk of said court, but was not served upon the plaintiff or his attorney, nor was it made in open court, the plaintiff being present or having notice thereof; *Held*, Unavailing to throw the costs made after the filing of such offer upon the plaintiff.

ERROR from Lancaster county. Tried below before POUND, J.

Brown & Ryan Brothers, for plaintiff in error.

Marquett, Deweese & Hall and *Foxworthy & Son*, for defendant in error.

COBB, CH. J.

This cause came up in the district court on appeal from a justice of the peace. The action was for trespass by live stock, for which the plaintiff claimed damages in the sum of one hundred dollars. There was an answer consisting of a general denial by the defendant and a reply by the plaintiff.

There appears upon the record an offer of judgment by the defendant, of which the following is a copy :

" AMOS PECK
v.
PETER W. ROSE. }

"Now comes the defendant, Peter W. Rose, by his attorneys, Brown & Ryan Bros., and offers to allow judgment to be taken against him for \$5.00 and costs in this action, wherein Amos Peck is plaintiff and Peter W. Rose is de-

Rose v. Peck.

fendant, now pending in the district court of Lancaster county, Nebraska.

"BROWN & RYAN BROS.,
" Attys. for Deft."

Which paper was endorsed:

"Amos Peck v. Peter W. Rose. Offer to confess judgment. Clerk's office, district court. Filed March 2, 1885.

"E. R. SIZER,
" Clk. D. C."

And also the following acceptance of offer:

" PECK
 v.
 ROSE. }"

"Now comes the above-named plaintiff, and waives service of written notice of offer herein and hereby accepts the offer of defendant for judgment against defendant in favor of the plaintiff for the sum of five dollars and all accrued costs:

" AMOS PECK, *Plaintiff.*
" Per Foxworthy & Son, his Attorneys."

This paper was endorsed as filed in the clerk's office March 4, 1884.

There is a journal entry under date the 5th day of March, 1885, and 10th day of the term, reciting the said offer of the defendant and acceptance by the plaintiff, followed by a judgment for the plaintiff and against the defendant for the "said sum of five dollars, together with his costs therein expended, taxed at \$122.40."

On the same day there was filed a motion, of which the following is a copy: "*Amos Peck v. P. W. Rose*, comes now the defendant and moves the court for an order requiring the costs in this case, which have accrued in this case since the filing of the defendant's offer to confess judgment, to be taxed to plaintiff.

"BROWN & RYAN BROS.,
" Attys. for Deft. Rose."

There seems to have been several affidavits filed as well in support as in resistance of the said motion, but as they were not preserved by a bill of exceptions they cannot be considered here. There was also a cross-motion by plaintiff to tax the costs to defendant.

The court overruled the motion of defendant and sustained that of the plaintiff. The defendant thereupon brings the cause to this court on error, and assigns the following errors:

"1. The court erred in not sustaining the motion of plaintiff herein to tax the costs which were made after filing of offer to confess judgment to the defendant herein.

"2. The court erred in taxing the costs made after offer to confess judgment to plaintiff herein.

"3. The court erred in sustaining the motion of defendant herein to tax all costs in the case to plaintiff herein."

There is no brief by either party. The record contains no bill of costs, nor is there any evidence that there were any costs made in the case by either party after the filing of the offer to confess judgment, nor a suggestion even as to the amount of costs that were thus made.

Section 570 of the code provides as follows:

"After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed or part of the causes involved in the action. Whereupon if the plaintiff being present refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer," etc.

Section 565 also provides that, "the defendant in an action for the recovery of money only, may at any time be-

fore the trial serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum specified therein. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney within five days after the offer is served, the offer and an affidavit that the notice of acceptance was delivered in the time limited may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer verified by affidavit; and in either case the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer."

Section 1004 also contains a provision on the subject of offers to confess judgment. But as that section applies only to justices courts it will not be noticed further.

The offer of the defendant not having been made in open court, nor served on the plaintiff in the court below out of court, does not come within the provision of either section, and was therefore unavailing to throw the costs made after its being filed in the clerk's office upon the plaintiff below, even if it appeared that any costs were made in said court after the filing of such offer.

The judgment and order of the district court are therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

GUST UPPFALT, PLAINTIFF IN ERROR, V. JOHN NELSON,
DEFENDANT IN ERROR.

18	533
30	194
18	533
35	167
18	533
39	186

Ejectment: PLEADINGS. Where in an action for the recovery of real property the answer of the defendant put in issue the title of the plaintiff, but alleged no equitable defense, a finding and judgment for the plaintiff upheld, notwithstanding there was evidence which, under proper allegations, would have tended to establish an equitable defense.

ERROR to the district court for Cuming county. Tried below before POST, J., sitting for CRAWFORD, J.

Parrish & Lewis and *Uriah Bruner*, for plaintiff in error.

T. M. Franse, for defendant in error.

COBB, CH. J.

This was an action for the recovery of a tract of land, together with compensation for the use thereof while in the alleged unlawful possession of the defendant. It was such an action as before the code was called an action of ejectment. But many years before the adoption of the code the legislatures of most of the states had abolished the most of the artificial and technical features of the action of ejectment as described by the common law writers; and yet it remained a common law remedy, as distinguished from equitable ones, and since the adoption of the code it remains "the remedy generally made available for the trial of title to land." See note to Chase's Blackstone, p. 783.

The statute of Nebraska, section 626 of the code of civil procedure, provides as follows:

"In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has

a legal estate therein, and is entitled to the possession thereof, describing the same * * * and that the defendant unlawfully keeps him out of possession. * * *

Section 627 also provides that, "It shall be sufficient in such action if the defendant in his answer deny, generally, the title alleged in the petition, or that he withholds possession, as the case may be; but if he deny the title of the plaintiff possession by the defendant shall be taken as admitted. * * *"

Now I understand the meaning of these two sections, taken together, to be that this action is based primarily upon the legal title on the part of the plaintiff, but also depending upon his having also the right of immediate possession. The letter of the statute would seem to confine the defendant to a legal defense in so far as he may seek to dispute the legal title of the plaintiff; but after admitting the legal title of the plaintiff he may doubtless plead, and upon the trial prove, any fact or facts which upon recognized principles of equity would defeat the claim of the plaintiff to the immediate possession of the land. It will be seen, upon an examination of the section of the code last quoted, that such an answer on the part of the defendant would be altogether consistent with the actual possession of the land by the defendant, and in point of fact it is usually the case that the facts and circumstances of such possession constitute an important part of such equitable defense.

To apply the above observations to the case at bar, the petition of the plaintiff in the court below seems to be in due and approved form. The answer of the defendant in said court is equally unexceptionable in form for the purpose of presenting an issue upon the legal title of the plaintiff. Such legal title it not only does not admit, but directly denies, and it fails to state a single fact of an equitable character or which tends to invoke the equitable powers of the court.

This court has often repeated that proper allegations in pleadings are as necessary to a judgment as are the proofs to sustain such allegations; neither can be dispensed with in contested cases.

Having carefully examined the evidence in the case as preserved in the bill of exceptions, there remains no doubt on the mind of the writer that the *legal title* to the land is in the defendant in error, the plaintiff in the court below. Had there been such pleadings as were necessary to lay a proper foundation for the evidence introduced by the defendant and received by the court over the objection of the plaintiff, tending to show his equitable rights growing out of his transactions with the former owner of the land before the proper recording of plaintiff's deed, and other circumstances, such evidence would have been deemed entitled to very great weight in the disposition of the case. But for the want of such allegations in the pleadings it must be presumed that although the objection to the introduction of such evidence was overruled by the trial court, its final consideration was refused, and in this I conceive there was no error.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	536
24	103
18	536
62	427a

THE STATE OF NEBRASKA, FOR THE USE OF CUMING
COUNTY, PLAINTIFF IN ERROR, V. JAMES MORAN,
SEN., DEFENDANT IN ERROR.

Recognizance. In an action on a recognizance taken by a justice in a proceeding before him, under the provisions of chapter 37 of the Compiled Statutes, *Held*, That such recognizance was binding upon the security thereunto although the same was not recorded by the justice in his docket and was signed by the parties thereto.

ERROR to the district court for Cuming county. Tried below before BARNES, J.

Wilbur F. Bryant and *T. M. Franse*, for plaintiff in error.

E. K. Valentine, for defendant in error.

COBB, CH. J.,

This action was brought in the district court of Cuming county by the state, for the use of Cuming county, plaintiff, against James Moran, Jr., and James Moran, Sr., defendants. The defendant, James Moran, Sr., was served with process, appeared, and answered. James Moran, Jr., was not served, and did not appear in the case. The cause was tried to the court without a jury. There was a finding and judgment for the answering defendant, and the cause is brought to this court on error by the state.

It appears from the pleadings and bill of exceptions that on the 13th day of February, 1882, James Moran, Jr., was arrested upon a warrant issued by H. J. Stevens, a justice of the peace of Cuming county, and brought before said justice on a charge of bastardy by an unmarried woman whose name it is deemed unnecessary to give for the purposes of this case. There was an examination before

the justice in accordance with the provisions of section 1 of chapter 37 of the Compiled Statutes. That thereupon the said justice found probable cause for the said charge, and ordered the said James Moran, Jr., "to enter bail to appear at the next term of the district court in and for Cuming county, and in default thereof, of giving bond of \$500 to appear as above ordered, to stand committed to the jail of Cuming county. Whereupon said James Moran, Jr., submitted his bond with James Moran, Sr., as his surety thereto for his appearance, which bond was duly approved" by said justice in the sum of \$500. It further appears that at the next regular term of the district court of Cuming county the said James Moran, Jr., appeared and entered his plea of not guilty to said charge of bastardy, whereupon a trial was had to a jury, which found the defendant guilty. Thereupon the said defendant made a motion for a new trial, which was overruled, and thereupon it was by the court "ordered and adjudged that said James Moran, Jr., is the reputed father of the child of the prosecutrix * * * that said James Moran, Jr., pay the costs of this prosecution and pay * * * or her order, for the maintenance and support of said child, eighty dollars per year until said child be fourteen years old or until further ordered by this court," etc., and further ordered that said James Moran, Jr., give security in the sum of five hundred dollars for the performance of the said orders of the court, and that if he neglect or refuse to give security as aforesaid, and to pay the costs of said prosecution, "he shall stand committed to the jail of the county, to remain until he shall comply with the order of this court."

It further appears that afterwards and on the 21st day of March, 1882, the said cause came on again for hearing on a motion of plaintiff to forfeit the bond in said cause, "and thereupon the said James Moran, Jr., and James Moran, Sr., were each three times solemnly called in open

court, and appeared not, and the court adjudged said bond forfeited, and ordered a *capias* to issue for the said James Moran, Jr.," etc.

Upon the trial of the case at bar the defendant James Moran, Sr., objected to the introduction in evidence of the record as above, and especially of the said recognizance or bond, on the ground that the same was not such an instrument as is authorized by law to be taken by a justice of the peace, and hence is not binding upon the parties. And although such objection was overruled by the court on the trial and the record and bond or recognizance admitted in evidence, yet the court finally found "the facts to be that a *bond* was taken in this cause by the justice instead of a recognizance, and that the bond taken was not in law such a recognizance as the justice could take, and was not entered of record in his docket. The court therefore finds for the defendant."

The only question then for the consideration of this court is, whether the surety, James Moran, Sr., is legally bound for the penalty fixed by the said justice and contained in the bond or recognizance required to be given for the appearance of the said James Moran, Jr., and for his abiding the order of the court on said accusation. The recognizance or bond is in the following form:

"THE STATE OF NEBRASKA, }
CUMING COUNTY. } ss.

"Be it remembered that we, James Moran, Jr., of Cuming county, Nebraska, as principal, and James Moran, Sr., as surety, do hereby acknowledge ourselves indebted to the State of Nebraska, for the use of Cuming county, in the penal sum of \$500, to be well and truly paid if default be made in the following conditions: Whereas, the said James Moran, Jr., has been arrested upon a warrant issued by H. J. Stevens, a justice of the peace in and for Cuming county, Neb., West Point precinct, upon the complaint of * * * an unmarried woman resident of said county, for being

the father of a bastard child of which said * * * was delivered June 18, 1881. The condition of this recognizance is such if the said James Moran, Jr., shall appear at the next term of the district court to be held in and for Cuming county, Neb., to answer such accusation and to abide the order of the court therein, then this recognizance to be null and void, otherwise in full force and effect.

"[Signed]

JAMES MORAN, JR.

"JAMES MORAN, SR."

"Taken and acknowledged before me this 13th day of February, 1882.

"Signed,

H. J. STEVENS,

"Justice of the Peace."

The proceedings in the original case, including the recognizance for the appearance of the accused, seem to have been substantially in accordance with the forms of procedure as contained in an approved and standard work on practice in justices court, and to be in conformity with the requirements of the statute.

The point is made by counsel in his brief that no testimony was admissible, for the reason that the petition does not state a cause of action on the following grounds:

"1. The conditions and obligations of the said recognizance are not set out, and a failure of said obligation averred as by law required.

"2. It does not aver that James Moran, Jr., principal obligee, failed to appear and abide the order of the 'district court of Cuming county, Nebraska,' at its next term after the making of the alleged recognizance, or at any term of that court.

"3. It does not state before whom said alleged recognizance was entered into.

"4. It is silent on the following necessary averments: 'A recognizance must be filed or made a record of a court to sustain a suit, and must be so averred in the petition.

It should also be averred that the default in not complying with the conditions of the recognizance was entered of record.'

"5. It does not aver that said alleged recognizance was ever filed by the justice of the peace, or that he certified the same to the clerk of the district court, as by statute required."

Some of the above points of objection would probably be good under a strict and technical system of pleading, but under a liberal system like ours, I think the court committed no error in receiving the testimony. Besides, the counsel presenting said points is not here attacking, but seeking to sustain, the judgment of the district court. The main question in the case—that arising upon the recognizance—not having been entered on the docket of the justice, and its having been signed by the parties, was fully discussed in this court in the case of *King v. The State*, ante p. 375, and to that case I refer for the reasons and authority upon which I come to the conclusion that the district court erred in its finding of fact, that the bond taken by the justice was not in law such a recognizance as the justice could take, and in finding for the defendant. By reference to the opinion in that case, it will be seen that a recognizance will be considered of record although never recorded by the justice taking it, and that it becomes such upon being returned to the proper court and there placed on file. The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

The other judges concur.

GEORGE W. ADAMS, PLAINTIFF IN ERROR, v. JOSEPH
N. THOMPSON, DEFENDANT IN ERROR.

Action on Appeal Bond: ESTOPPEL. Suit brought on an undertaking or bond entered into for the purpose of appealing from the judgment of a justice of the peace; *Held*, That the defendant was estopped to deny that an appeal had been taken in the case, in contradiction of his undertaking or bond executed in conformity to the statute for the purpose of perfecting an appeal, although the same was filed with the justice of the peace after the expiration of the time limited for that purpose; and the said appeal was dismissed in the district court for the reason of said undertaking or bond having been filed out of time. *Gudtner v. Kilpatrick*, 14 Neb., 347.

ERROR to the district court for Cass county. Tried below before POUND, J.

Beeson & Sullivan, for plaintiff in error.

H. D. Travis and *Crites & Ramsey*, for defendant in error.

COBB, CH. J.

It appears from the record in this case that the defendant in error, Joseph N. Thompson, in a certain action before G. C. Cleghorn, a justice of the peace of Cass county, recovered a judgment against one William W. Riggs, on the 11th day of September, 1882, for the sum of two hundred dollars and costs. That for the purpose of appealing said judgment to the district court, the plaintiff in error, George W. Adams, executed an appeal bond in said case in the usual form. This bond bore no date on its face, but was endorsed by the said justice as follows: "Received this bond this 22d day of September, 1882, and approved the same as to form and sufficiency, and not as to time, it being the eleventh day after judgment, and does not oper-

18	541
23	184
18	541
34	674
18	541
36	411
18	541
40	451
18	541
44	61
18	541
53	196

Adams v. Thompson.

ate as stay of execution." At the following term of the district court, the said appeal having been docketed in said court, was, on motion of the said Thompson, appellee, dismissed, and the judgment affirmed, for the reason that the said appeal had not been taken within the time provided by law. Upon the said order of dismissal being certified to said justice of the peace, as required by law, an execution was duly issued against the said Riggs thereon, placed in the hands of a constable for service, and by him returned wholly unsatisfied for the want of goods of the said Riggs whereon to levy the same.

Thereupon the said Joseph N. Thompson brought his action in the district court against the said George W. Adams on the said appeal bond. The said Adams filed his answer in said action in which he denied that the said William W. Riggs ever appealed the said action from the said justice, or that he ever caused the said bond to be approved by the said justice, or that the same ever was in fact approved by him, and averred that the said justice refused to approve said bond. Also that the said first action was dismissed out of the said district court on motion of the said plaintiff, for the reason that said bond was not given within the time required by law, etc.

The cause was tried to the court, which found the issues for the plaintiff, and rendered judgment for him in the sum of three hundred thirty-six dollars and ninety-seven cents, besides costs. The defendant brings the cause to this court on error.

The question presented by the record is, whether a person who voluntarily becomes security for a losing party in an action before a justice of the peace or other inferior court for the purpose of enabling such party to appeal to the appellate court, upon the failure of such appeal on account of the same not having been taken within the time limited by law, will be held to the terms of such suretyship notwithstanding such failure of the appeal.

The purpose and object of an appeal in judicial proceedings is generally two-fold: 1. To enable the losing party to obtain a new trial in a higher court, and thereby possibly escape what he conceives to be an unjust judgment; and, 2. To stay the issuance of an execution against him. Hence it cannot generally be said that when the appellant fails to obtain a new trial he fails in the whole object and purpose of his appeal, as he has usually enjoyed the benefit of the stay of execution. But plaintiff in error claims that this case is an exception in that respect, and because of the endorsement by the justice of the peace on the bond that the same was not approved "as to time, it being the eleventh day after judgment, and does not operate as stay of execution," and as the court refused to approve the said bond and appeal, the office of securing a new trial of the cause in the appellate court, that the whole proceeding was abortive and of no effect to bind the maker of the bond. In support of this proposition counsel cited cases, most of which are cases arising upon incomplete delivery of official bonds, deeds of land, and commercial paper, and none of them exactly in point to the case at bar. There is a broad distinction between such cases and one like that under consideration, where a party to a proceeding in court presents a paper which immediately upon such presentation becomes a part of the record. No question of delivery or acceptance can, in my judgment, arise in such case. As to the point whether the giving of the appeal bond under consideration did, in point of fact or of law, stay the issuance of an execution, notwithstanding the peculiar endorsement of the justice, it is quite evident that it was given that effect by the plaintiff in that court, as no execution was issued or applied for, so far as the record shows. And had one been issued by the justice, after the filing of the bond, it would doubtless have been enjoined. A justice of the peace doubtless has control of his own records, and has the power to reject or return a paper presented for approval

Adams v. Thompson.

and filing clearly out of time. But when, instead of rejecting or returning it, he endorses even a qualified approval upon and places it on file, thus making it a part of the record of the case, he is in his future action bound to recognize it as such.

But while the justice is estopped by the record which he has made, the party who has procured the same to be made is equally estopped to deny its legal effect, and equally so is his bondsman or security.

The question of law involved in this case was before this court in the case of *Gudtner v. Kilpatrick*, 14 Neb., 347. The only difference between that case and the case at bar is, that there the appeal was taken in time, but the district court dismissed it, holding that the case was not appealable, the judgment before the justice having been taken and rendered upon default of and in the absence of the defendant, etc. After a pretty thorough examination of authorities we held in that case that the defendants—the defendant in the justice's court as well as his security having signed the appeal bond and been sued thereon—were estopped to deny that an appeal had been taken in the case, etc., and so reversed the judgment of the district court in favor of the defendants, and I see no sufficient reason for reversing the conclusion to which we were led by the authorities and reasons then considered.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

D. E. SEDGWICK, APPELLEE, v. GEO. W. DIXON ET AL.,
APPELLANTS.

18	545
34	515
18	545
39	567
18	545
43	715

1. **Usury.** Where a promissory note secured by mortgage based in part upon an usurious consideration is transferred before maturity to a *bona fide* purchaser for value, without notice, and in the usual course of business, he takes it free from the defense of usury. *Wortendyke v. Meehan*, 9 Neb., 221.
2. **Attorney's Fee.** An attorney's fee under the act of February 18, 1872, when allowable should "be fixed" and allowed by the trial court upon a recovery of judgment by a plaintiff, and when once fixed within the statutory limits the amount thereof will not be changed by the supreme court.

APPEAL from York county district court. Heard below before NORVAL, J.

Scott & Gilbert, for appellants.

Sedgwick & Power, for appellee.

COBB, CH. J.

This action was brought in the district court of York county to foreclose a mortgage executed on real property situated in the said county by the appellants to the Phoenix Mutual Life Insurance Company. Judgment was rendered for the plaintiff in the district court, and the cause is brought to this court on appeal by the defendants.

The only defense presented by the pleadings is, that the consideration for the note to secure which the mortgage was given was usurious. And defendants set out in their answer the facts upon which their said plea of usury is based: 1. That said Phoenix Mutual Life Insurance Company agreed to loan the defendants the sum of seven hundred dollars for five years at ten per cent interest payable

semi-annually, but that said Phoenix Mutual Life Insurance Company only actually paid or delivered to said defendants the sum of six hundred and eighteen dollars, and took therefor their principal note, due in five years and twenty-two days, for seven hundred dollars, and their nine interest or coupon notes for thirty-five dollars each, and one interest or coupon note for thirty-nine dollars and twenty-seven cents.

Defendants also deny in their answer that Juliette H. Lawrence and Frank Tipton purchased the said note and mortgage in good faith and before the maturity thereof, but allege that they purchased the same with full knowledge of the facts in the said answer before stated, etc.

If the note was usurious in the hands of the Phoenix Mutual Life Insurance Company, but was by it sold before maturity to a purchaser who received it *bona fide* for value and in the usual course of business, and who afterwards transferred it to the plaintiff, then the defense must fail as completely as though there were nothing in the pleadings or proof to establish usury in the inception of the transaction.

It appears from the pleadings and testimony that the note became due on the first day of May, 1883, and that on the 28th day of March, of the same year, the note was sold and assigned to Juliette H. Lawrence for its value, and without notice of its usurious character. Mrs. Lawrence having been called to the stand to prove the above facts was submitted to a searching cross-examination. But from the findings of the court we must presume that she sustained herself throughout, not only in the assertion of her own *bona fides* and want of notice or knowledge of the usurious character of the note, if such it had, but of its having been purchased by herself without the intervention of an agent, and in the usual course of *her own business*; and I cannot say that there was not sufficient evidence before the court to sustain such findings.

Having reached the above conclusion it becomes unnecessary to examine whether the transaction was usurious as between the original parties to the note, or the subordinate question as to whether Moore and Ocoboc were the agents of the loaner or of the borrower, or the question raised by counsel for the plaintiff, whether upon the assumption that the husband of Juliette H. Lawrence acted as her agent in the purchase of said note it was incumbent upon the plaintiff to negative his knowledge or notice of the usurious character of the note, if such it had, or whether on the other hand the burden of proof again shifted upon proof of the *bona fides* and want of knowledge or notice of the purchaser herself. These are all interesting questions, but a press of business and the near approach of the next term admonish me to resist the temptation to enter upon their discussion at this time.

The note in this case contained a clause for the payment of an attorney's fee equal to ten per cent of the amount found due to the holder of the note in case of its collection by law. The district court found that fifty dollars was a reasonable attorney's fee for the services performed in that court, and awarded the plaintiff that sum. Counsel for appellee, in the brief, now contend that as by reason of the appeal to this court appellants having made further service of attorneys necessary, this court ought to award them an additional sum.

The act of February 18, 1873, Gen. Stat., 98, which was in force at the date of the transaction we are now considering, did not contemplate the naming of a particular or definite sum in a note or mortgage which the maker would pay as an attorney's fee, but it simply empowered the court in the class of cases therein mentioned to award to the plaintiff an attorney's fee not exceeding ten per cent of the recovery. But this is to be awarded to the plaintiff upon "a recovery of judgment," and no power is

Seling v. State.

granted this court to enlarge such award upon affirming such judgment on appeal.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

HENRY SELING, PETER FOX, JAMES CLARK, JOSIAH CLARK, AND FREDERICK NAUBAUER, PLAINTIFFS
IN ERROR, V. THE STATE OF NEBRASKA.

1. **Criminal Law: HOUSE BREAKING.** In a prosecution for a violation of section fifty-one of the Criminal Code, where it is shown that the accused went to the house of another in the night time and called to the persons within, who were asleep, to open the door, falsely stating that he was the sheriff of the county and desired to serve a subpoena; but when the door was opened he ordered the inmates of the house to throw up their hands, but before he could enter the house the door was closed, and through which he shot twice, and then forced the door open and entered the house, this was held to be sufficient proof of a breaking and entering.
2. ———: ———: **EVIDENCE.** The fact that such person after obtaining admission approached the head of the family in his bed, fired off his pistol, and presented the muzzle thereof to the person, ordering him in a threatening manner to hold up his hands, would be sufficient proof of personal violence to meet the requirements of said section fifty-one.
3. **Trial: QUESTIONS FOR JURY.** Questions of fact are for the trial jury to determine, and when the testimony is conflicting a verdict of guilty in a prosecution for a misdemeanor will not be set aside if there is evidence sufficient to sustain it, notwithstanding it may be contradicted by the testimony on the part of the defense.

ERROR to the district court of Adams county. Tried below before MORRIS, J.

Hayes & Taggart, for plaintiffs in error.

William Leese, Attorney General, and *A. H. Bowen*,
for the state.

REESE, J.

Plaintiffs in error were indicted for a violation of section fifty-one of the Criminal Code. Upon trial they were found guilty, and judgment of conviction was rendered on the verdict. Three questions are presented for decision by their brief. The first is, that the verdict was not sustained by sufficient evidence. The plaintiffs were tried jointly, but the contention in the brief is separately made, and it is insisted with considerable force that as to a part of them at least the verdict should be set aside. The bill of exceptions is quite voluminous, and we can see no good purpose to be subserved by a critical review of all the testimony. We have carefully read all the evidence, and find it as contradictory as it is possible for it to be. The witnesses for the state speak with absolute certainty as to the identity of plaintiffs in error, some of whom they knew by their faces, although they were partially masked, and some by their voices, while each defendant as positively testified that he was not present at the time of the commission of the offense, and knew nothing of it until his arrest after the finding of the indictment, and by the testimony of their families and co-defendants proved that they were elsewhere at the time the crime is alleged to have been committed. Two of the witnesses for the defense were, upon cross-examination, shown to have been criminals; one, a defendant, admitting that he had been twice convicted of felonies, and the other, the wife of a defendant, having cohabited with her husband in adultery for a number of years until the Monday last preceding the trial. Six witnesses testify that the reputation of the principal

witness on the part of the state for truth and veracity is bad, while five testify it is good. Under these circumstances the question of the weight of the testimony of each witness was peculiarly for the decision of the jury. Without discussing any of the testimony as applicable to each one of plaintiffs in error it is sufficient to say that if the jury believed the testimony of the witnesses for the prosecution there was sufficient to sustain the verdict.

The second contention upon the part of plaintiffs in error is, that the testimony of the witnesses for the state, if true, does not sustain the charge of *breaking* into the dwelling-house of the witness Hornback as charged in the indictment. The testimony on this branch of the case is, in substance, that soon after four o'clock on the morning of the 26th of February, 1884, while it was yet dark, plaintiffs in error went to the house of the witness and called. This call awoke Hornback, who was asleep with his family in the house, and he inquired who was there. The answer was, "The sheriff from Hastings, with a subpoena." He then instructed his son to open the door. The son lighted a lamp and opened the door. As soon as the door was opened he was ordered to throw up his hands, which he declined doing, but closed the door. Two shots were then fired, the balls passing through the door. The door was broken open, when the assailants entered, firing two additional shots, and ordering Mr. Hornback to throw up his hands, and Mrs. Hornback to get out of bed and dress herself. Three pistols were pointed at Mr. Hornback, yet in bed, accompanied with the order to throw up his hands. No further notice need here be taken of what occurred in the house. This is sufficient to show the breaking. Wharton's Crim. Law, § 765.

The third contention is as to the proof of personal violence. Upon this part of the case but little need be added to what we have already said. The firing of four pistol balls into a house, one of which, from the direction taken,

might quite reasonably be presumed to have been aimed at Mr. Hornback, would seem to be sufficient. The pointing of a loaded pistol at another in a menacing manner is an assault. Wharton's Crim. Law, § 606. Would the pointing of three loaded pistols in such a manner be any the less an assault? We presume not. As to the ultimate purpose or object of the visit we are left in doubt. A part of Mr. Hornback's property was carried out of the house, but when he called his assailants by name and told them he recognized them they withdrew, but not until after the commission of the crime charged was complete.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE VILLAGE OF PONCA, PLAINTIFF IN ERROR, V. JAMES CRAWFORD, DEFENDANT IN ERROR.

1. **Evidence.** The rule of evidence which precludes the proof of the contents of written instruments or records by parol testimony, does not preclude oral testimony of the existence of such instruments or records preliminary to their introduction or proof of their loss or destruction.
2. **Discretion of Court.** The order of introducing evidence is discretionary with the trial court.
3. **Error Without Prejudice.** A judgment will not be reversed nor a verdict set aside for an error which has been committed without prejudice to the party complaining.
4. **Personal Injuries: DAMAGES: EVIDENCE.** Where in an action for damages resulting from personal injuries a physician, being a son of plaintiff, was permitted to testify, over the objection of defendant, to the opinions expressed by consulting physicians who were called to examine plaintiff as to the results of the injury, it was *Held*, To be error, the testimony being incompetent and hearsay.

18	551
23	663
18	551
27	774
18	551
31	107
18	551
36	146
18	551
44	20
18	551
45	281
18	551
50	544

ERROR to the district court of Dixon county. Tried below before CRAWFORD, J.

Gantt & Norris, for plaintiff in error.

L. S. Fawcett and Barnes Bros., for defendant in error.

REESE, J.

This action was instituted in the district court by defendant in error to recover damages alleged to have been sustained by reason of personal injuries suffered in the corporate limits of defendant, by falling from the end of a sidewalk onto a "saw-bench" and other obstructions which had been left lying at the end of the sidewalk. The sidewalk was laid along the east side of Union street from Third street south, along the west side of a building to its south-west corner, where it terminated at a height of about three feet above the ground, and without any steps or other convenient way of getting onto or off the sidewalk. The night of the accident was a dark one. Defendant in error, being a stranger in the village, and desirous of passing south on Union street, took the sidewalk referred to, following it to the end, where he discovered the termination of the walk by the dark appearance in front of him, but supposing it had been provided with steps or other convenient method of descent, placed one foot on the end of the sidewalk and reached down with the other, "feeling" for the step. He lost his balance and fell, receiving the injury complained of. The trial resulted in a verdict in favor of defendant in error for \$1,100.00, upon which judgment was rendered. Plaintiff in error brings the case to this court, and seeks a review. The questions presented for discussion will be noticed in the order in which they occur in the brief of plaintiff in error.

The first proposition to which our attention is called is,

that the district court erred in overruling a motion for an order on defendant in error requiring him to make his petition more definite and certain. We are unable to find any record of a ruling upon this motion, and as an answer to the petition was subsequently filed, we must presume the motion was waived.

On the trial one W. H. Clark was a witness for the purpose of proving certain steps taken by the citizens of plaintiff in error preliminary to its organization as a village, that question having been put in issue by the answer. This witness testified that in the year 1876 he was one of the members of the board of county commissioners of Dixon county. He was then asked whether or not there was ever presented to the board of commissioners of which he was a member a paper purporting to be a petition asking for the incorporation of the village of Ponca. This question was objected to by plaintiff in error as being incompetent, irrelevant, and immaterial, and not the best evidence, the petition itself being the best evidence. The objection was overruled, and the ruling of the court is now assigned for error. Leaving out of consideration the fact that the petition was shown by the next witness to be lost, we cannot see that the court erred in overruling this objection. The question put to the witness did not seek to prove the contents of the paper referred to, but the fact that what purported to be such a paper had existed and was presented to the commissioners. We do not understand that the rule prohibiting oral proof of the contents of a paper also prohibits proof of the existence of such a document.

The county clerk was called as a witness, and after the necessary preliminary proof the county commissioners' record for July 5, 1876, was offered in evidence, to which objection was made as incompetent, irrelevant, and immaterial. This objection was overruled, and the ruling is complained of. This record was clearly competent, relevant, and material. Had the objection been urged that the proper

foundation had not been laid by the introduction of the petition, or proof of its loss, a different question would have been presented, and the witness could have been interrogated, if necessary, as he was a moment afterward, as to the loss of the petition. The record showed by its recitals that a petition was filed, and while we do not decide that any further proof was necessary, yet, if such were the case, the want was supplied by proof of the loss of the petition. Objection was also made to the introduction of two patent deeds from the United States to the trustees of Ponca, under the act of congress of March 3, 1855, commonly known as the "Town Site Act," by which the land upon which the village is situated was deeded to the corporate authorities of defendant. These patents were introduced for the purpose of proving the incorporation in fact of defendant. Whether they were competent for that purpose is not a controlling question in this case, for the reason that their introduction could work no possible prejudice to plaintiff in error, since it was shown by defendant's own records that the trustees appointed by the county commissioners on the 5th day of July, 1875, duly qualified and entered upon the discharge of their duties on that day, and that the corporate powers of defendant had been maintained and exercised ever since. While it was material and necessary to show the incorporation of defendant, yet the legality of each step taken in such organization and incorporation, which had been in actual existence for years before the accident, was not a material nor necessary inquiry. *Back v. Carpenter*, 29 Kas., 349. In this connection it is insisted that the court erred in overruling the motion of plaintiff in error to strike out all of the testimony of the witness then upon the stand that did not tend to prove the corporate capacity of plaintiff in error, the court having sustained an objection to further testimony as to the condition of the sidewalk, upon the ground that the incorporation had not been proved. But as the incorpor-

ation was subsequently proven, the error, if one, was without prejudice, and could not affect the rights of plaintiff in error. At most it could only reach to the order of the introduction of proof, as it could not be claimed the testimony would have been improper had it been introduced after proof of the user of the corporate franchise by plaintiff in error. The order of the introduction of testimony must be left to the discretion of the trial court. *Goodman v. Kennedy*, 10 Neb., 270.

The clerk of plaintiff in error was called as a witness, and identified the claim presented to the board of trustees for the damages demanded, and which was rejected by them. The claim was admitted in evidence over the objection of plaintiff in error. The object of this evidence, as stated and understood at the time of its introduction, was to show a compliance with section eighty of chapter fourteen, Compiled Statutes of 1881, which provides, in substance, that no costs shall be recovered against a city or village in certain cases where the claim has not been presented to the city council or board of trustees to be audited. As it has been decided by this court that the provision of this section applies alone to claims arising upon contract, and not upon torts, the testimony was improperly admitted. *Nance v. Falls City*, 16 Neb., 85. But whether or not the error would be considered of so prejudicial a character as to require a reversal of the judgment, it is not necessary now to decide, as the judgment will have to be set aside for reasons hereafter given.

The next question presented by plaintiff in error is based upon the action of the court in overruling its objection to the testimony of the witness Dr. R. B. Crawford, a son of defendant in error. Defendant in error in his testimony stated in substance that he had suffered a great deal, and that one of his breasts had become greatly enlarged, and there was at that time a swelling there, and that about two or three weeks before the trial "something swelled up in"

his breast which almost suffocated him. After considerable testimony of that character he was caused to remove his clothing and expose his body to the jury, exhibiting the enlargement. When Dr. Crawford, the son, was called as a witness, he testified, among other things, as to this enlargement, and the condition of defendant in error from the time of the injury to the trial. His testimony upon the subject of this enlargement was in part as follows:

Q. State, if you can, what caused that or what it is?

A. I don't exactly know what it is. I will be honest in that confession. I have been puzzled in my own mind in regard to it. So much so that I laid the case before Drs. Frazee, Beggs, and Clinger, of Sioux City, and they were not fully decided in their own minds as to what it was.

Q. Were you present at the time of this alleged examination by those doctors?

A. I was, yes, sir.

Q. Did you take part in it?

A. Yes, sir.

Q. Go on and state what was done.

A. They removed his clothing and examined this enlargement. I had it done with a view to know whether it was endangering his life or not. I was undecided in my own mind whether it was or not, and it worried me a good deal. Their opinion was it was the result of an injury.

Defendant objects as being incompetent and not responsive. Objection overruled by the court. Defendant excepts.

Q. State whether or not you took part in this examination?

A. I did, as I said before, I believe.

Q. State what you found as the result of that examination?

A. They didn't decide fully what it was.

Q. State more fully whether you took part in the examination, and in the forming of the opinion that resulted?

A. Well, if you will allow me to explain, I took him into Dr. Frazee's office first and told him there was a matter that I wanted an opinion about, and if he thought best I wanted other opinions in regard to it. I told him what my opinion was about it. He said he would like to have Dr. Beggs see that also, so we had Dr. Beggs come in, and then we had Dr. Clinger come in, and they all examined that with him. All of us had hands in that examination, and each expressed his opinion of it after it was done. The result of that examination was that we decided that it was the result of an injury.

Defendant objects to the last clause of the above answer as being incompetent, irrelevant, and immaterial, and hearsay, and moves to strike it from the record for that reason. Motion and objection overruled by the court. Defendant excepts.

Q. State your conclusions as the result of that joint examination?

A. I think we all decided that it was a tumor resulting from an injury.

The admission of this testimony so far as it applied to the expressions of opinion by the other physicians was clearly incompetent and prejudicial. The examination was *ex parte* produced by defendant in error and his son, without the knowledge of plaintiff in error, its agents, or attorneys, none of the physicians engaged in it were under oath and no opportunity given the defendant in error to cross-examine them as to the basis of their conclusions. The testimony was upon an essential part of the case, and was simply hearsay.

We know of no rule by which the testimony or opinions of expert witnesses may be produced in evidence, save by the usual methods of taking their testimony where the opinion rests upon the facts of the case on trial. If those doctors had opinions as to the cause of this enlargement of which defendant in error desired the benefit, he should

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have placed them upon the witness stand, in order that plaintiff in error might cross-examine them.

It is contended that the court erred in giving certain instructions asked by defendant in error, and in refusing to instruct according to the prayers of plaintiff in error. It is sufficient to say that we have examined these instructions and find no good cause for complaint.

For the error in admitting the objectionable testimony above referred to a new trial must be granted.

The judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

BENJAMIN A. GIBSON, PLAINTIFF IN ERROR, v. ALBERT N. SULLIVAN AND REUBEN W. HYERS, DEFENDANTS IN ERROR.

1. **Error Without Prejudice.** A judgment will not be reversed nor a verdict set aside when an error has been committed without prejudice to the party complaining.
2. **Written Instructions for Jury.** The provision of section 54 of chapter 19 of the Compiled Statutes, directing the charge of the court to the jury to be written in consecutively numbered paragraphs, is a right which the supreme court will regard as waived if no objection is made or exception taken at the time the charge is given, or where exception is taken to a particular clause only. *Smith v. The State*, 4 Neb., 277.
3. **Trial: QUESTIONS FOR JURY.** Juries are the judges of questions of fact when properly submitted to them in cases of conflicting testimony.

ERROR to the district court for Cass county. Tried below before BROADY, J., of the first district, sitting in that county.

18	558
43	611
43	856
18	558
47	371
18	558
58	773
18	558
59	50

E. H. Wooley, for plaintiff in error.

Beeson & Sullivan, for defendants in error.

REESE, J.

This was an action brought by plaintiff in error against defendants in error to recover the sum of \$200.00, alleged to be due from them as commissions for negotiating a sale of certain real estate owned by them. The cause was tried to a jury, and resulted in a general verdict for defendants and a judgment against plaintiff for costs. Plaintiff alleges error and brings the case into this court.

The real difference between the parties was, that plaintiff insisted that the land was placed in his hands for sale as a real estate broker, for a certain price, that he effected a sale of part and procured a purchaser for the remainder, and, therefore, was entitled to the usual and customary fees or commissions charged by brokers, while defendants insist that they instructed him that the price named was the net price required by them, and, therefore, no commissions were due, even if plaintiff had sold the land. The testimony showed that the transaction was a tedious one in its development, and that it was some time after the first contract or agreement was made until the sale was finally ratified by defendants. Various objections were made as to terms of payment, etc., and offers submitted for the purpose of overcoming them, but finally the sale was consummated. The whole can be said to constitute but one transaction or trade. Urging the contrary view, plaintiff insists that the court erred in overruling an objection made by him to a question asked him on his cross-examination. One answer to this objection is, that the answer of plaintiff being directly in favor of his theory of the case, even if the court did err in overruling the objection, no possible prejudice could result to him, and

therefore the judgment could not be reversed on that ground. *Dillon v. Russell*, 5 Neb., 489. *Eiseley v. Malchow*, 9 Id., 181. Other reasons supporting the ruling could be assigned, but this is sufficient.

The next contention is, that the motion for a new trial should have been sustained because the instructions given by the court on its own motion were not in consecutively numbered paragraphs, and the word "given" was not written on the margin as required by sections 54 and 55 of chapter 19 of the Compiled Statutes. This objection was not made until after verdict. The record shows that when the objection was made the court offered to number and endorse the instructions, but the offer was "respectfully declined." The objection now urged cannot be available to plaintiff in error. The court proposed to number the instructions and allow exceptions to such as were objected to. Nothing more could have been accomplished had the instructions been numbered by paragraphs before being read to the jury. If it was not desirable before the exceptions were taken, it could accomplish no good purpose, and would be an empty form. It may also be observed that parts of the instruction were excepted to, and this "will be considered as a waiver of the right to have the charge paragraphed and numbered." *Smith v. The State*, 4 Neb., 277.

Objection is made to certain instructions given to the jury. It is claimed that they are indefinite, and might tend to confuse the jury. We have carefully examined all of the instructions and cannot so hold.

The contention on the part of plaintiff is, that he actually sold one quarter of a section and procured a purchaser for two others. The court gave the following instruction, which is excepted to: "The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence of every material allegation of his petition, as to each alleged sale and service before he can recover for such sale,

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and to satisfy you by a fair preponderance of the evidence as to every material allegation of his petition as to both sales before he can recover for both." It is claimed that this part of the instruction, when considered with the rest of the charge, might lead the jury to conclude that no recovery could be had by plaintiff unless he could recover for both sales. We do not think this position can be successfully maintained, as the next succeeding instruction was in the following language: "It is competent for you, if you think the evidence so justifies, to find in favor of one party to this suit as to one alleged sale, and in favor of the other party to the suit as to the other sale. If you find for the plaintiff as to one or both of the alleged sales, you will find a verdict for the plaintiff and assess his damages in the verdict. If you fail to find in favor of the plaintiff as to either of the alleged sales by a fair preponderance of the evidence, you will find for the defendants."

The next and last contention of plaintiff in error is, that the verdict is against the clear weight of the evidence. The testimony was conflicting, and while the circumstances seem to support the theory of plaintiff in error as to his demand for at least a part of the amount claimed, yet the whole question of fact was fairly submitted to the jury, and as there was sufficient testimony to support the finding, it cannot be disturbed.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18 562
19 687

ANTON CABON, PLAINTIFF IN ERROR, v. CHARLES
GRUENIG, DEFENDANT IN ERROR.

Transcript of Judgment. Any person having a judgment rendered by a county court, without reference to the amount of such judgment or whether rendered by the county court during a regular term or by the county judge when exercising the ordinary powers and jurisdiction of a justice of the peace, may file a transcript thereof in the office of the clerk of the district court in any county in this state and cause an execution to issue thereon.

ERROR to the district court for Pierce county. Tried below before CRAWFORD, J., sitting for TIFFANY, J.

H. C. Brome, for plaintiff in error.

L. F. Hale and *E. P. Weatherby*, for defendant in error.

REESE, J.

The only question presented for decision by this case is, whether or not the transcript of a judgment rendered by a county judge when exercising "the ordinary powers and jurisdiction of a justice of the peace," when filed in the office of the clerk of the district court of a county in this state other than the one in which the judgment is rendered, becomes a lien on the real estate of the judgment debtor in such county and whether an execution can be issued thereon.

Section 18 of chapter 20 of the Compiled Statutes is as follows:

"Any person having a judgment rendered by a probate (county) court may cause a transcript thereof to be filed in the office of the clerk of the district court in any county of this state, and when said transcript is so filed and entered upon the judgment record, such judgment shall be a lien on real estate in the county where the same is filed, and when

the same is so filed and entered upon such judgment book, the clerk of such court may issue execution thereupon in like manner as execution is issued upon judgments rendered in the district court"

It is insisted by plaintiff in error that this section only refers to such judgments as are rendered by the county court in its jurisdiction which is concurrent with the jurisdiction of the district court, and that it has no reference to judgments rendered by the county judge when in the exercise of the powers of a justice of the peace. While it is true there is a distinction between these two jurisdictions as to rules of practice, etc., yet it seems that this distinction has no reference to the judgments of such court after they are rendered, so far as may apply to the section under consideration. In some instances the legislature seems to have recognized this distinction, in others not. By section one of the act there is established in each organized county a probate (county) court which shall be held by the probate (county) judge and shall be a court of record, etc. Its proceedings out of term time shall be as valid and effectual as if had or made at a regular term. By section two it is provided that *county judges* shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and by the same section county judges have concurrent jurisdiction with the district court in the sum of \$1,000. The provisions of sections eight, nine, ten, eleven, sixteen, seventeen, nineteen, twenty, twenty-one, twenty-two, and twenty-six, seem to recognize all actions pending, or proceedings had, as being in the county court, but that the proceedings shall differ according to the amount involved in the action or proceeding.

We do not conceive that the views here expressed are in any degree in conflict with the decision in *Wilde v. Boldt*, 16 Neb., 539. While it is true, as there stated, that there is a distinction between the jurisdictions of the county judge and that of the county court proper, yet the judg-

Hanson v. Lehman.

ments when rendered are all the judgments of the county court and are all enforced in the same way by the judge issuing execution as is provided by section 17 of the act.

The decision of the district court being in harmony with this opinion is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18 564
48 712

MARY E. HANSON, APPELLEE, v. L. C. LEHMAN AND
AMELIA LEHMAN, APPELLANTS.

1. **Pleading:** ANSWER. A denial must be direct and unambiguous and answer the substance of each direct charge. Such facts as are not denied are for the purposes of the action taken as true. *Harden v. A. & N. R. R. Co.*, 4 Neb., 521.
2. ———: ———: SPECIFIC PERFORMANCE. In an action for the specific performance of a contract to convey real estate, an answer alleging that plaintiff had agreed to construct a building upon the lot when she purchased it, but had failed to do so, no such condition being contained in the written contract, and no facts being alleged which would show that it would be to the advantage of the defendant to have such building constructed, constitutes no defense to the action.

APPEAL from Stanton county district court. Tried before CRAWFORD, J.

Brome & Durland, for appellants.

No appearance for appellee.

REESE, J.

Plaintiff seeks the specific performance of a contract for the sale of certain real estate executed by the defendant to

her. The contract, an ordinary bond for a deed, is set out in the petition. The recital is, that plaintiff has agreed to purchase the property described, "as follows: Twenty-five dollars with interest from date at the rate of ten per cent per annum, the above amount and interest to be paid on or before the first day of April, 1882." No other reference is made to the time of payment nor to the performance or failure to perform the contract on the part of plaintiff. The contract was signed by defendant. The petition alleges that the time for payment was extended by defendant for a year or longer if desired by plaintiff, and that shortly after the expiration of the year she tendered the money due and demanded a deed, which was refused.

The answer admits the making of the contract, but denies that he did "on or about the first day of April, 1882, grant an extension of time for the payment of the \$25 and interest thereon, required by the terms of the agreement," and denies that plaintiff "has performed or offered to perform the conditions on her part of the contract to be done or performed." The answer further alleges that it was the duty of plaintiff to pay the taxes on the premises, but that she failed to do so, and that he has paid them, but fails to give the amount paid by him, and fails to ask any relief in that behalf. It is also alleged that at the time of the sale it was agreed that plaintiff should erect a building on the real estate in question to be used for the purpose of a laundry, and that the same was to have been constructed prior to the execution of the deed, but that plaintiff has failed to construct the building, and that thereby defendant is discharged from the contract.

To this answer a demurrer was interposed by plaintiff, upon the ground that the answer did not state facts sufficient to constitute a defense. The demurrer was sustained. Defendant appeals. Does the answer state a defense?

It cannot be claimed that by the terms of the contract

the *time* of payment is made an essential ingredient. Therefore it is doubtful if the allegation of the waiver or extension as alleged in the petition was a necessary allegation. But assuming that it was, the denial is insufficient. The answer does not deny the extension but denies granting it at the *time* alleged. In this the answer is ambiguous and not sufficient. *Harden v. A. & N. R. R. Co.*, 4 Neb., 521. Maxwell's Pleading and Practice (4th ed.), 126.

The same is true of the denial of performance of the contract on the part of plaintiff. None of the allegations of the petition are denied, but rather the conclusion to be drawn from them.

As to the payment of taxes it is apparent that nothing was claimed, or the facts would have been stated, and as the amounts paid, if any, were not alleged, no defense could be based thereon.

The last defense pleaded is, that it was agreed that plaintiff should erect a building on the premises. There is nothing alleged which would tend to show that it was a matter of any importance to defendant whether plaintiff built a house on the premises or not. The facts alleged constituted no defense.

• The ruling of the district court in sustaining the demurrer was right, and is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSEPH C. DE WITT, PLAINTIFF IN ERROR, V. ALONZO D. ROOT AND EMERSON F. ROOT, DEFENDANTS IN ERROR.

Statute of Frauds: PROMISE NOT WITHIN STATUTE. The mother of A. was taken sick. A physician was called, who began to treat her. Upon his second visit she became dissatisfied and desired another physician. A. instructed the physician to pay no attention to the complaints of his mother, but to continue the treatment, and he would pay him for his services. Whereupon the physician continued to treat her; *Held*, That the promise was not to answer for the debt of another, but was an original undertaking, and not within the statute of frauds.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Abbott & Abbott, for plaintiff in error.

Duwes, Foss & Stephens, for defendants in error.

REESE, J.

Defendants in error are physicians. This action was instituted for the purpose of collecting a balance due for medical services rendered in the treatment of the mother of plaintiff in error by and upon his employment and promise to pay. The defense was a denial of the allegations of the petition so far as the promise to pay was concerned, and an allegation that the services were rendered for his mother who was living upon her farm, and not with him, and that he was not liable even if such a promise was made, it being within the statute of frauds. The trial resulted in a finding and judgment in favor of defendants in error for the sum of forty-four dollars. A motion for a new trial was made upon the ground that the finding was not sustained by sufficient evidence and was contrary

to law, which being overruled, plaintiff in error brings the cause into this court for review.

It is insisted by plaintiff in error that the finding that he made the promise is not sustained by sufficient evidence. Upon this part of the case it is enough to say that the testimony was conflicting, and the finding of the trial court will not for that reason be molested.

The next question is, assuming the employment and promise to have been made as testified to by the witnesses of defendants in error, can the judgment be sustained or is the promise void for the reason that it was to answer for the debt of another and was not in writing? From the testimony of one of the defendants in error and one other witness it appears that the mother of plaintiff in error was sick, and defendants in error were called to treat her. One of them, the senior member of the firm, visited her once prior to the time when the alleged agreement was made. On the second visit the patient expressed some dissatisfaction, and desired to be treated by a physician in a neighboring town, when plaintiff in error called the physician out of the house and requested him to pay no attention to the complaints of his mother, that she was nervous and "fussy," but to take such care of her as was necessary, and that he would pay him to do so, and that upon this request and promise the services for which the judgment was given were rendered, and that at other times during the rendering of the services he urged the physician to be attentive to her as might be necessary, frequently promising to pay the debt. So far as this testimony goes, it appears that the undertaking was an original one. The patient knew nothing of it and it was in no sense an undertaking to answer for her debt. It is insisted by defendant in error that the case is identical with *Rose v. O'Linn*, 10 Neb., 364, but we cannot so view it. In that case Rose promised to see that the doctor was paid. In this, if the testimony of plaintiff's witnesses is true, and of that the trial court was the

 Morehead v. Adams.

judge, the promise was direct and unconditional. In that case the patient was the hired laborer of the person making the promise, and in whom he had no special interest, while in this case the promise was prompted doubtless by the affection which a son is presumed to entertain toward a mother.

It is claimed the judgment is excessive. This question is not presented by the record and cannot be examined. The answer admits the rendition of the services, and no claim is made in the motion for a new trial that the judgment is excessive.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	569
27	620
18	569
62	569

**PHILIP C. MOREHEAD, SHERIFF, PLAINTIFF IN ERROR,
v. LE GRAND B. ADAMS, ASSIGNEE, DEFENDANT IN
ERROR.**

1. **Bill of Exceptions.** Where an order of the district court extended the time forty days from the adjournment of the court in which to "present" a bill of exceptions, *Held*, To mean the time within which to prepare the bill and present the same to the adverse party or his attorney.
2. —: **CONSTRUCTION OF STATUTE.** The statute relating to bills of exceptions being remedial in its nature will be liberally construed.
3. —: **PAPERS** in a bill of exceptions marked by the initials of the judge, written by himself, will not be stricken out of the bill as not being identified.
4. **Assignment for Creditors.** A creditor under the assignment law of 1877 is not precluded from suing the debtor and recovering judgment upon his claim, but the assigned property will

not be liable for the satisfaction of the judgment unless he can have the assignment set aside as being fraudulent against creditors.

5. ———: **INSOLVENT FIRM.** Where a firm is insolvent the partners cannot by a sale to one partner of their interest, three days before an assignment for the benefit of creditors is made, divest the property of its partnership character so as to defraud partnership creditors.
6. **Instruction to Jury.** An instruction that "you will assess to the plaintiff such damages as from all the evidence in this case you shall find he has sustained by reason of the illegal taking and detention of the personal property," is vague, and liable to mislead the jury. *Wasson v. Palmer*, 13 Neb., 376.

ERROR to the district court for Nuckolls county. Tried below before MORRIS, J.

Groff & Montgomery and Kaley Bros., for plaintiff in error.

Case & McNeny, for defendant in error.

MAXWELL, J.

The defendant in error has filed a motion to quash the bill of exceptions herein, "because the same was not presented within forty days from the adjournment of the court below, in accordance with the leave granted by said court."

The order of the court fixing the time in which to prepare the bill is as follows: "Defendant has leave to present his bill of exceptions in forty days from the adjournment of this court." The point made by the defendant is, that the word "present" used in the order means to present to the judge for his signature, and does not mean to prepare the bill. Without entering into a discussion of the meaning of the words prepare and present, it is apparent that the intention of the court was to grant forty days from the adjournment of the court in which to prepare the bill and

present or submit it to the adverse party for correction or amendment. It is not the policy of the law to place a narrow, technical construction upon a statute which provides the procedure to obtain a bill of exceptions. The statute is remedial in its nature, and should receive such a construction as will give effect to its provisions; and the court will, if possible, save the rights of the parties by sustaining the bill. Code, § 311. The motion must therefore be overruled.

2. The defendant's attorneys also move to strike out of the bill of exceptions certain papers relating to attachment proceedings, in which Reed, Jones & Co. were plaintiffs and the Beal Brothers defendants, and also where D. M. Steele & Co. were plaintiffs and Beal Brothers defendants, for the reason that "the same are not identified in or authenticated by, or in any manner made a part of, the bill of exceptions herein." It is also alleged that an "affidavit was not submitted to the attorneys of defendant in error within forty days from the adjournment *sine die* of the court." It appears from the certificate of the judge that the papers in question were offered in evidence, and they are identified by the initials of the judge written by himself on the margin. The papers are sufficiently identified, therefore, and will not be stricken out of the bill. The affidavit of the attorneys of the defendant in error accompanying the motion fails to allege that the affidavit for an attachment to which objections are made was not offered in evidence. So far as appears, the bill as signed is absolutely correct, and such is the presumption.

The question to what extent a judge, before signing a bill of exceptions containing the evidence, where it has been previously agreed upon by the respective attorneys, may add to the same, is not presented in this case. The motion to strike out is overruled.

3. It appears from the record that on October 6th, 1882, Asher Beal and Harlan Beal were partners doing a general mercantile business at Superior, in Nuckolls county;

that on that day Harlan Beal sold his interest in the firm to his brother Asher for the sum of about \$1,000, \$40 in cash, and a note for \$960, Asher to assume the firm debts; that at the time of this sale the firm of Beal Brothers was insolvent, and on the ninth day of that month Asher Beal made an assignment to the defendant for the benefit of his creditors. The assignee accepted the trust and complied with the requirements of the statute in regard to filing an inventory, etc., and seems to have been disposing of the goods at private sale. On December 18th, 1882, and on January 10th, 1883, Reed, Jones & Co. and D. M. Steele & Co., creditors of Beal Brothers, commenced actions by attachment in the district court of Nuckolls county against Beal Brothers, and levied upon a part of the goods in the hands of the assignee. Motions were afterwards filed to dissolve the attachment, which were overruled; and in October, 1883, Reed, Jones & Co. recovered judgment for the sum of \$729.17, and costs, and D. M. Steele & Co. for \$969.69, and costs, and an order to sell the attached property was made in each case. A sale of the attached property being about to take place, the assignee brought this action, and the goods were taken on an order of replevin. On the trial of the cause the jury returned a verdict in favor of the assignee for \$750, upon which judgment was rendered.

The case was tried upon the theory that the goods in question being in the hands of an assignee were in *custodia legis*, and therefore not subject to attachment. This would be true if the assignment was valid; but in this case the defendant below set up in his answer, and sought to prove, that the assignment was fraudulent, and intended to defraud the creditors of the firm, and that Harlan Beal was one of the creditors to be paid out of the proceeds. This was stricken out of the answer, and proof thereof excluded. This, we think, was error. Where a firm is insolvent the partnership property will be applied to the payment of the partnership debts, and an individual cred-

itor of a member of the firm cannot be paid out of the partnership funds to the exclusion of creditors of the firm. *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489. *Roop v. Herron*, 15 Id., 73. See cases cited in note to *Auley v. Ostermann*, 25 N.W. Rep., 662. And any scheme that would place the firm property out of the reach of such creditors, and apply it to the use of members of the firm, would be fraudulent as to such creditors. A judgment or award, if obtained by fraud, may be set aside, and held for nought; and an assignment, the object of which is not to apply the assigned property to the proper use, is open to the same objection. In other words, if the object of the assignment was to deprive the creditors of the firm of the proceeds of the partnership property, and bestow the same upon creditors of an individual partner, one of whom—and the most important apparently—was the retiring partner, and the property was being thus appropriated, the right of the partnership creditors to attach, under our former assignment law, is undoubted. The question of fraudulent intent, under our statute, is one of fact, to be determined by the jury on proper instructions by the court. Where, therefore, the validity of the assignment itself is put in issue by the pleadings and proof, it is the duty of the court to submit that question to the jury.

In *Lininger v. Raymond*, 12 Neb., 170, it is said: "When, instead of distributing his property among his creditors as far as it will go, the assignor places it beyond their reach by an assignment, for the purpose of preserving it for his own use or that of a friend, courts do not hesitate to declare such assignment void, because, under the pretext of an assignment, the debtor has concealed or prevented the application of his property to the payment of his debts. But where the debtor parts with all control of his property, and devotes it absolutely to the payment of his debts, without reservation, the advantage to creditors is clear and direct, and although there may

be delay in the payment of the debts, still the assignment is not fraudulent and will not be declared void." And an assignment which provides for an equitable distribution of the proceeds of the debtor's property among his creditors will be sustained, unless good cause exists for setting it aside.

4. The court instructed the jury as follows: "In this case you will find for the plaintiff, and you will assess to the plaintiff such damages as from all the evidence in this case you shall find he has sustained by reason of the illegal taking and detention of the personal property in this action."

The testimony tends to show that the goods in question had been held under the orders of attachment heretofore mentioned, for about nine months, when a sale of the attached property being about to take place under the orders of the court, the assignee brought this action to obtain possession of the goods. Without considering the unexplained delay in bringing the action, the instruction furnishes no guide to the jury to enable them to estimate the damages properly. It is similar in this regard to that in *Wasson v. Palmer*, 13 Neb., 378, which was held to be erroneous. The sole purpose of an instruction upon the question of damages is to furnish the jury a rule by which to estimate the same, otherwise they would be left entirely to their own guidance, and an erroneous verdict would almost invariably be the result.

In conclusion, it is evident that there are many facts and circumstances connected with this case that were not investigated on the former trial that should be fully examined on the next. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JAMES MILLS, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: LIBEL.** A libelous charge made by A against B contained in a letter written and mailed in this state to C, residing in another state, is sufficient to render A liable in this state for the offense.
2. ———: ———: **HUSBAND AND WIFE.** To render a husband liable for a letter containing libelous charges written by his wife, it must appear either that he aided in or authorized the writing of the libelous matter
3. ———: ———: ———: **EVIDENCE.** Where on an indictment for libel for matter contained in a letter signed in the husband's name he was found guilty, and the testimony tended to show that the letter was written by the wife, and that the husband did not aid in composing or authorize the use of the libelous words, the judgment was reversed.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

O. H. Ballou, for plaintiff in error.

Lee Estelle, District Attorney, and *John L. Kennedy*, for the State.

MAXWELL, J.

At the February, 1885, term of the district court of Douglas county an indictment was found against the plaintiff in error, wherein said jury present: "That James Mills, late of the county aforesaid, on the twentieth day of January, Anno Domini one thousand eight hundred and eighty-four, in the county of Douglas, and state of Nebraska aforesaid, being a person of an envious, wicked, and evil mind, and of a malicious disposition, and wickedly, maliciously, and unlawfully contriving, and intending, as much as in him lay, to injure, oppress, aggrieve, and

villify the good name, fame, credit, and reputation of Alice Daily, and to bring her into public scandal, hatred, infamy, and disgrace, and of his great hatred, malice, and ill-will towards the said Alice Daily wickedly, maliciously, and unlawfully did compose, write, and publish, and cause to be composed, written, and published, a certain false, scandalous, and defamatory libel of and concerning the said Alice Daily, containing therein among other things the false, malicious, and libelous words and matter following:" Then follows the libelous matter complained of, with proper innuendoes, "Which said false, malicious, scandalous, and defamatory libel he, said James Mills, afterward, to-wit, on the twenty-first day of January, in the year of our Lord eighteen hundred and eighty-four, at Omaha, in the county aforesaid, unlawfully and maliciously did send, and cause to be sent, to one John C. Heiskel, in the form of a letter addressed to the said John C. Heiskel, and did thereby, then and there unlawfully and maliciously publish and cause to be published the aforesaid libel," etc.

On the trial of the cause Mills was found guilty, and sentenced to imprisonment in the county jail for thirty days, and to pay a fine of one dollar and costs. The only ground of error assigned in this court is, that the verdict is not supported by the evidence.

It appears from the testimony that the Southwest Presbyterian Church, of Omaha, was organized in 1883, Mills, the plaintiff in error, and wife, and Howland Daily and Alice Daily, his wife, becoming members; that in the year 1884 charges were made against Mrs. Mills for circulating slanderous reports about Mrs. Alice Daily; that the session was composed of two members, of which Mr. Daily the husband of Alice was one. As a result of the trial Mrs. Mills was suspended for one year. The question of the correctness of that decision is not before the court, and as no appeal was taken to the presbytery it was no doubt correct; still it is very evident that Mr. Daily

was not in a situation to act impartially in the case, with his own wife as the accuser, and perhaps some of the slanderous words affecting himself. A church trial, like any other, should be had before an unbiased, impartial tribunal, and must be so held to do justice. Otherwise, while outwardly fair, there is danger that the decision will reflect the feelings or sympathies of those rendering it.

The result of the trial seems to have caused both Mills and wife to feel very much aggrieved, and he called upon several prominent members of the church asking them to sign a petition for a rehearing. He obtained but few if any signers, however. About this time (January 20, 1884) the letter to John C. Heiskel, of West Virginia, was written and signed "James Mills." Mr. Heiskel it appears was sheriff of one of the counties of West Virginia, and a stranger to Mills and wife. The letter was professedly written for information, but contains charges that no one with a proper sense of duty would make without proof. The charges are stated and repeated as though the subject was agreeable to the writer, and Mr. Heiskel is importuned and urged to look up proof in support thereof. And an offer is made to pay the expenses of a certain alleged witness. In effect the writer says to Mr. Heiskel: "I make these charges, now please look the proof up to sustain them." In our view the jury were fully justified in finding, as they must have done, that the charges were fabrications; and if the proof showed that the letter in question had been written by the plaintiff in error, the judgment would be affirmed. The plaintiff in error, however, denies writing the letter in question, and in this he is corroborated by a number of experts in writing, by the foreman under whom he was working at that time, showing that he was absent from Omaha, by the original letter itself, which is in evidence, and other letters and papers containing his signature, and by his wife who testifies that she wrote the letter complained of, and signed her hus-

band's name to it because of some of the language used therein. The letter itself bears evidence in various ways that it was not written by the husband; and there is no doubt it was written by the wife.

But it is said that even if the letter was written by the wife alone, still if he caused it to be written by her he will be liable. This would be true if it appeared that he had assisted in or authorized the composition of the libelous letter. *Miller v. Butler*, 6 Cush., 71. *Reg v. Cooper*, 15 L. J. Q. B., 206. *Parker v. Prescott*, Law Rep., iv. Ex., 168. *Townsend on L. & S.*, 149. We find no testimony showing that the husband knew of the libelous matter contained in the letter at the time it was sent, the proof introduced by the state on that point merely showing that he admitted that they had written for information. A party should not be held liable for an offense that he did not commit or aid in committing, and the court will not infer co-operation in composing a libel from the mere request to write a letter of inquiry. There is no proof whatever that the plaintiff in error had seen the Heiskel letter at the time his statements were made or knew its contents. The proof, in fact, shows the contrary. There is not sufficient testimony, therefore, to sustain the verdict. While, however, the proof fails to show that the plaintiff in error either wrote or authorized the writing of the letter sent to Heiskel, it does show conclusively that he did write and send letters relating to the alleged scandal to other persons, and also that he had frequent conversations with certain citizens of Omaha in regard to the same; but as the indictment is based upon the Heiskel letter alone, the other letters and matters referred to cannot be considered. The impression created on the mind of the writer from reading the testimony is, that the plaintiff in error and his wife have yet much to learn in regard to respecting the good name and fame of others; and if the result of the trial shall be to cause them to recognize and respect such rights

Romberg v. Hughes.

it cannot fail to add to the happiness of others as well as themselves. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ALBERT ROMBERG, PLAINTIFF IN ERROR, V. M. J.
HUGHES, DEFENDANT IN ERROR.

1. **Verdict.** Where the evidence on the part of the plaintiff and defendant in an action is nearly equally balanced, the verdict will not be set aside as being against the weight of evidence.
2. **Attorney and Client.** To make a communication from a party to an attorney privileged, the relation of attorney and client must exist between them.
3. **Replevin: DAMAGES.** In replevin, damages for the detention of the property are recoverable only in case of a return. If the property is not returned the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking. *Hainer v. Lee*, 12 Neb., 452.

ERROR to the district court for Cuming county. Tried below before POST, J., sitting for CRAWFORD, J.

M. McLaughlin and *N. H. Bell*, for plaintiff in error.

Charles J. Green, for defendant in error.

MAXWELL, J.

In August, 1882, Ludwig and Franze Herse rented the farm of the plaintiff for four years, commencing on the 1st day of November, 1882. The terms were that the plaintiff should "furnish one-half of all seed and one-half of all

18	579
19	532
20	86
20	94
21	79
24	655
18	579
27	144
18	579
32	370
18	579
39	533
18	579
45	282
18	579
50	739
18	579
61	205
18	579
62	290
62	261
102	282
102	253

machines," and be liable for one-half of the personal property tax and to receive one-half of all the grain raised on the farm, one-half of the increase of live stock, etc. The testimony shows that the plaintiff had two brothers in the neighborhood where he resided, and some or all of them had employed the Herses, for some time prior to the execution of the lease, to work on their respective farms. The Herses were in straitened circumstances, and this fact was well known to the plaintiff. In November, 1882, the plaintiff sold a large quantity of personal property at auction, the terms of sale being cash for all sums of \$5 or under, and on sums in excess of \$5, promissory notes with an approved surety was to be given, said notes to be due in one year with interest at 8 per cent. At this sale the Herses were the highest bidders for two horses, the harness for the same, and a lumber wagon and other property, in all amounting to from \$800 to \$1,000. The Herses were unable or at least did not obtain a satisfactory surety to sign their note and consequently no note was given; but the Herses claim that the plaintiff at the time of the sale well knew that they could not give security, and that he waived it, as they were on his farm, and the horses, wagon, and harness in controversy were necessary to enable them to carry on the farm. The sale is denied by the plaintiff, who claims that after the failure of the Herses to give properly secured notes that he leased the chattels in question to them. In April, 1883, the Herses abandoned the farm of the plaintiff and sold the horses, harness, and wagon to the defendant for the sum of \$280 cash. The plaintiff thereupon brought an action of replevin and obtained possession of the property. On the trial of the cause the jury returned a verdict in favor of the defendant, upon which judgment was rendered. There are three questions presented by the record which will be considered in their order:

First, Did the plaintiff sell the property to the Herses

either by an absolute sale or conditionally? Upon this point the testimony is conflicting. The plaintiff and some of his witnesses testify that there was no sale, while an equal number testify on behalf of the defendant that the Herses purchased the property and were holding it as owners. The attorney for the defendant contends that if there is any evidence to sustain the verdict it will not be set aside. The rule adopted by this court, however, is that where a verdict is clearly wrong it will be set aside and a new trial granted. *Mathewson v. Burr*, 6 Neb., 319. *Fisk v. State*, 9 Id., 66. *Smith v. Evans*, 13 Id., 316. *Victor S. M. Co. v. Day*, 13 Id., 408. *Gandy v. Pool*, 14 Id., 101. *Staman v. State*, 14 Id., 68. *Kuhns v. Bankes*, 15 Id., 92. *Shapleigh v. Dutcher*, 15 Id., 563. It is unnecessary, however, to invoke the rule in this case, as the testimony is nearly equally divided and is not very satisfactory on either side. That some arrangement was made by the plaintiff whereby the Herses were to retain possession of the property in question was clearly established, and in our view the jury would have been justified in finding a conditional sale—a sale with a condition that the title should remain in the plaintiff until the property was paid for. But under the statute, where such a sale is not evidenced by writing signed by the vendee, and a copy thereof filed in the office of the county clerk of the proper county, it is not valid against a purchaser from the vendee in actual possession. Comp. Stat., Chap. 32, § 26. If there was a conditional sale this was not done, and the defendant having so far as the evidence shows purchased without notice, is entitled to protection. The evidence covers 288 pages, and it would subserve no good purpose to review it at length. It is so nearly equally balanced that this court cannot say that the verdict is wrong.

Second, That the court erred in permitting one T. M. Franse, an attorney, to testify to communications made by the plaintiff to him. There is no claim that at the time

this conversation took place the relation of attorney and client existed between the plaintiff and Franse. The parties seem to have been on friendly terms, and it is evident that the communications were made not as clients, but as voluntary statements outside of the relation of attorney and client. Sec. 328 of the code prohibits an attorney from testifying where there is no waiver by the party in whose favor the prohibition is enacted, "concerning any communication made by him to his client in that relation, or his advice thereon," etc., or "any confidential communication properly intrusted to him in a professional capacity," etc. Code, § 333. To render the communication privileged the relation of attorney and client must exist, otherwise the communication is not privileged. As all the proof shows that the relation of attorney and client did not exist when the communications were made, they are not privileged, and the court did not err in admitting them in evidence.

Third, The jury found the value of the property to be the sum of \$285, and assessed the damages for the detention of the property at \$1 per day, in all \$584.

Whereupon the court rendered judgment as follows: "It is therefore hereby adjudged and determined by this court, that the defendant have a return of the property taken on said writ of replevin, or, in case a return of said property cannot be had, that he recover of said plaintiff the value thereof, assessed at \$285, and his damages for withholding the same, assessed at \$584, and cost of suit, taxed at \$431.83," etc.

It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself, and not its value. In such case, when the property is returned, the party to whom the return is made is entitled

Romberg v. Hughes.

to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking. *Hainer v. Lee*, 12 Neb., 452. *Deck v. Smith*, Id., 389. The judgment in this case is clearly erroneous. For property of the value of \$285 the defendant is awarded a judgment for \$869 in case no return is had, and \$584 for the detention of property, if it is returned. Such a judgment ought not to be sustained, and the damages for the detention are excessive. These are simply for the use of the property. There is no claim that the property deteriorated in value during the time the plaintiff had possession of the same. It is not very probable that property of the value of \$285 produced during the time it has been in the plaintiff's hands profits of the net value of more than twice that sum. Such a verdict and judgment are greatly in excess of the actual damages sustained. The amount of recovery for the detention of property should ordinarily, where there is no deterioration, bear a reasonable proportion to the value of the same, otherwise the judgment cannot be sustained. The judgment of the district court is reversed, and the defendant has leave within twenty days to remit from the amount claimed for the *detention* of the property, all but the sum of \$200; and in case such remittance is entered as above provided, judgment will be entered in this court as follows: In favor of the defendant for a return of the property, and \$200 for the detention of the same; or, in case a return cannot be had, that he recover of the plaintiff the sum of \$285, with interest at seven per cent from the day of April, 1883. .

JUDGMENT ACCORDINGLY.

THE other judges concur. .

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MOSES VAN BUSKIRK, PLAINTIFF IN ERROR, V. J. S.
CHANDLER, DEFENDANT IN ERROR.

Payment: EVIDENCE. A defendant relying upon payment as a defense must, where it is denied, prove the same.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

Hayes & Taggart, for plaintiff in error.

Batty & Ragan, for defendant in error.

MAXWELL, J.

This action was brought on a promissory note, of which the following is a copy:

"\$216. JUNIATA, NEB., Nov. 28th, 1879.

"One year after date, we promise to pay to the order of Moses Van Buskirk the sum of two hundred and sixteen dollars, for value received, to bear ten per cent interest per annum from date. If the interest is not annually paid, to become as principal, and bear the same rate of interest, payable without defalcation or discount.

"J. S. CHANDLER,

"IRA G. DILLON."

The defendants answer jointly, and allege: *First.* That Ira G. Dillon signed said note merely as surety. *Second.* Usury in the transaction, the sum of \$16.00 being retained by the plaintiff in addition to ten per cent interest. *Third.* Payment.

On the trial of the cause the defendant Chandler demanded and obtained the opening and closing. Proof was introduced, and the jury returned a verdict in favor of the defendant, upon which judgment was rendered. The prin-

Van Buskirk v. Chandler.

cial ground upon which a reversal is sought is, that the verdict is against the weight of evidence.

Only the defendant Chandler appeared on the trial. He testified that the note in question was given for borrowed money, which he obtained from the plaintiff; that he received but \$200; that he paid the note by a check on C. R. Jones & Co.'s bank in Juniata. The check which he claims was given in payment of the note in question is as follows:

"No. 36. JUNIATA, NEB., October 20, 1880.

"C. R. Jones & Co., Bankers:

"Pay to Moses Van Buskirk, or bearer, two hundred dollars, \$200.

"J. S. CHANDLER."

It will be observed that this check was given more than a month before the note was due, and although the plaintiff had the note with him at the time the money was paid, there was no demand for the note or that the \$200 be credited thereon. These facts are significant in connection with the following testimony: The plaintiff testifies that Chandler and himself, on or about the date of the check, purchased at Kearney, of one Austin, "seven hundred and twenty-eight lambs and fifty old ewes," for the sum of "fifteen hundred and some odd dollars," and he loaned Chandler \$200 to pay on said sheep, taking the check in question therefor. In this he is corroborated by Mr. Austin, who sold the sheep, and a Mr. Thompson, to whom Chandler stated that he owned a part of them. Chandler admits in his testimony that he sold the wool and divided the proceeds. He claims, however, that the plaintiff was indebted to him, but fails to explain in what the debt consisted, or what right he had to take one-half of the proceeds of the wool, except as partner. There is other testimony in the record from which a partnership in the sheep in question may be inferred, but which need not be adverted to. Against this array of evidence we have the naked allegation of the de-

Lynch v. Lynch.

fendant, unsupported either by facts or circumstances. This is not sufficient to sustain the plea of payment as against the array of testimony on the part of the plaintiff. As a new trial must be had, the court in the next trial should permit greater scope of inquiry, as considerable testimony offered and excluded on the former trial seemed calculated to throw additional light on the matter. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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SUSAN J. LYNCH ET AL., APPELLEES, v. PATRICK W.
LYNCH ET AL., APPELLANTS.

1. **Homestead.** A tenant in common is not entitled to a right of homestead on the common property as against a judgment in partition in favor of a co-tenant for the value of his interest.
2. **Partition: JURISDICTION OF COURT.** Where an action in partition is properly brought on a legal title, and the defendant sets up an equitable defense, the court has authority to determine the validity of such defense, and adjudicate upon the rights of the parties.
3. — : **CASE STATED.** Where a certain lot of the value of \$2,500 was devised by will to six persons, two of whom conveyed their interests to the defendant, in an action of partition, *Held*, 1st, That where one of the shares was attached to the shares of the defendant without objection, a judgment making the value of such share a lien on the defendant's portion was not erroneous. 2d, That a balance due from the defendant for rents and profits appropriated by him might be enforced against his interest in the property.
4. — : —. Where the premises are incapable of a fair division, the court has power to award a pecuniary compensation to one of the parties for equality of partition.

APPEAL from the district court of Douglas county.
Tried below before NEVILLE, J.

George W. Ambrose and E. F. Smythe, for appellants.

A. Swartzlander and Burnham & Balliett for appellees.

MAXWELL, J.

This is an action of partition brought in the district court of Douglas county. It is alleged in the petition, in substance, that on the 17th day of October, 1870, one Mary Lynch departed this life seized in fee of lot 6, block 198, in the city of Omaha; that before her death, said Mary Lynch made a last will and testament, which was afterwards admitted to probate by the probate court of Douglas county, by which she devised said real estate in equal shares to her six children, viz.: Susan Lynch, Margaret Clary, Mary E. Michaelson, Patrick W. Lynch, James H. Lynch, and Daniel Lynch; that in April, 1882, Daniel Lynch conveyed his interest in said lot to Susan J. Lynch, and assigned to her the rents and profits thereof accruing since the death of said testator; that Susan J. Lynch is the owner of an undivided third of said lot, Margaret Clary an undivided one-sixth interest, Mary E. Michaelson an undivided one-sixth interest, Patrick W. Lynch an undivided sixth interest, and James H. Lynch an undivided sixth interest, and that Patrick W. Lynch has received the rents and profits of the same since the 17th day of October, 1870. The prayer is for partition, and to require Patrick W. Lynch to account.

In the answer of Patrick W. Lynch it is alleged "that, long prior to the death of said Mary Lynch the said property was purchased of Charles H. Brown with money belonging to Patrick W. Lynch, and at his request the title to said property was taken in the name of Mary Lynch,

Lynch v. Lynch.

the mother of said Patrick, and for the sole purpose of holding the same in trust for the said defendant Patrick Lynch. He also alleges that he had no notice of his mother's will, and claims to be entitled to the exclusive possession of said lot. He also pleads title by adverse possession for more than ten years. On the trial of the cause the court found that the interests of two of the heirs had been conveyed to the defendant, and that Susan J. Lynch was entitled in fee to an undivided one-third part of said lot, Margaret Clary to an undivided sixth part, and the defendant to an undivided one-half, and the interests of said parties as above found were confirmed. Referees were thereupon appointed to make partition of said lot, and a referee also to find the value of the use and occupation of the same since the 17th day of October, 1870, and the amount expended for repairs, permanent improvements, taxes etc.

The referee found that the defendant had expended for repairs and permanent improvements the total sum of \$598, and for taxes and assessments against said lot the sum of \$510.20, that the rents and profits amount to the sum of \$2,436.00, from which, after deducting the sum of \$1108.-20 expended by the defendant for improvements, repairs, and taxes on said lot, leaves a balance of \$1,327.80 for which the defendant is chargeable. No exceptions were filed to this report and it was confirmed. Thereafter the referees appointed to make partition made a report, in which they allot to Susan J. Lynch the west one-third of said lot, being 22 feet front and running back its entire length, and to the defendant the east two-thirds, being 44 feet front and running back the entire length. They also found the value of the entire lot to be the sum of \$2,500, and "that for equality of partition the said Patrick W. Lynch pay to the clerk of the district court, for the use of Mrs. Margaret Clary, plaintiff in the case, the sum of four hundred and sixteen $\frac{66}{100}$ dollars as her share and

Lynch v. Lynch.

portion of said lot." No objections were made to this report and it was confirmed. Afterwards a further decree was entered in said court as follows:

The court assigned to Susan J. Lynch the west one-third of the lot in question in severalty, and to the defendant the east two-thirds in severalty, subject, however, to the payment by him to Margaret Clary of the sum of \$416.66 in lieu of her one-sixth share or interest in said lot, which sum was decreed to be a specific lien on said two-thirds interest of the defendant, to be enforced by execution. Also that the defendant stand charged with one-half of the net rents and profits of said lot, of which sum \$442.60 was due Susan J. Lynch, and \$221.30 due Margaret McClary, and that said sums be a specific lien on said two-thirds interest of the defendant. There were certain other orders as to the payment of taxes and costs, upon which no issue is made and need not be considered. It is admitted in the abstract that the testimony offered by the plaintiff fully sustained the allegations of the petition, and that the report of the referee as to the value of the use and occupation of the premises is fully sustained.

The sole question presented by the appellants is, the power of the court to render judgment making the value of the interest of Margaret McClary a lien on the defendant's two-thirds of said lot, and to make the judgment for one-half of the net sum due for rents and profits a lien thereon. It is said the court had no jurisdiction.

1st. It is claimed that the premises in question are the defendant's homestead. It will not be contended that a tenant in common by taking possession of the common property can by claiming the property as a homestead divest the rights and interest of his co-tenant. The right of homestead is always subordinate to prior rights or interests of other persons in the property. *Gunn v. Barry*, 15 Wall., 623. *Homestead Cases*, 22 Gratt., 331. *Bowker v. Collins*, 4 Neb., 496. *State Bank v. Carson*, 4 Id., 502.

The defendant has no right of homestead in the premises, therefore, as against the rights of the plaintiffs.

2d. To sustain the allegation of want of jurisdiction the appellant has cited *Tabler v. Wiseman*, 2 Ohio State Rep., 210. *Greenup v. Sewell*, 18 Ill., 53. *Louvalle v. Menard*, 1 Gil. (Ill.), 39. The exact point intended to be brought to the attention of the court by these cases is not clear, but probably that partition was not a proceeding to decide title. In *Tabler v. Wiseman*, 2 O. S., 210, cited by the appellant, one Moudy died seized of the tract of land of which partition was sought, the whole of which had been assigned to the widow as dower, the widow being still alive when the proceedings were had. The parties to the suit were the heirs at law, and the question for determination was, could partition be had during the continuance of the dower estate? The court below held that it might, but as the lands could not be divided, and as one of the heirs elected to take the same at the appraised value, the court confirmed the election so made, and ordered a deed to be made upon payment of the purchase money. The supreme court held that the proceedings were erroneous, but as the plaintiff in error had received and still retained his part of the money paid for the estate in pursuance of the order confirming the election, it was a waiver of the error. In the discussion of the question there is a great deal said by Judge Ranney, who delivered the opinion of the court, that was not pertinent to the question at issue.

In this case the title of the plaintiffs was put in issue by the answer, and an adjudication had thereon, which being against the defendant is conclusive, no appeal having been taken. At common law partition lay only where the lands were held in coparcenary. The remedy was afterwards extended by statutes 31 and 32, Henry VIII., to joint tenancies and tenancies in common. The writ, however, lay only against the tenant in possession, and as partition was made by the sheriff by actual division, in case

the interests were incapable of exact apportionment a court of law possessed no power to make compensation for the inequality. Hence, in consequence of the inadequacy of the legal remedy, partition became a matter of equitable cognizance, the remedy being extended to all persons interested in the estate. *Brook v. Hertford*, 2 P. Wms., 518. *Gaskell v. Gaskell*, 6 Sim., 643. *Wills v. Slade*, 6 Ves., 498. Under the former chancery practice if the plaintiff's legal title was disputed the court refused to proceed until he had established his right at law. *Wilkin v. Wilkin*, 1 Johns. Ch., 111. In the case cited, Chancellor Kent says (page 118): "The jurisdiction of chancery in awarding partition is not only well established by a long series of decisions which are noticed by Mr. Hargrave (N. 23 to Lib. 3, Co. Lit.), but it has been found by experience to be a jurisdiction of much public convenience. *Calmady v. Calmady*, 2 Ves., Jr., 570. The court, however, does not sustain a bill of partition unless the title be clear; and in case of the *Bishop of Ely v. Kenrick* (Bunb., 322) the bill for partition was dismissed because the title was denied. In another case (*Cartwright v. Pultney*, 2 Atk., 380) Lord Hardwick observed, "that where there were suspicious circumstances in the plaintiff's title the court would leave him to law," etc. That this was the rule under the former equity practice there is no doubt, and may perhaps be the same under our present procedure where the titles relied upon are purely legal. But that question is not before the court. But where equitable titles are in dispute a court of equity has jurisdiction to determine the rights of the parties and grant partition in the same action. *Hitchcock v. Skinner*, Hoff. Ch., 21. *Cartwright v. Pultney*, 2 Atk., 380. *Coxe v. Smith*, 4 Johns. Ch., 271. In the case last cited the defendants in their answer alleged that the deed from Coxe to Redman was in the nature of a trust, but the court held otherwise and ordered partition. It is essential, however, that the

legal title should be before the court, otherwise if the equitable title only was presented to it, the power to cause the execution of conveyances might be greatly abridged. *Miller v. Warmington*, 1 Jac. & Walk., 484.

In partition in equity the court will take the necessary steps to protect the rights of the parties by the equal division of the estate. In other words, the court does not act in a merely ministerial character, in obedience to the call of some or all of the parties, but administers relief in such manner as to do equal and exact justice as far as possible. Therefore, where premises are incapable of a fair division the court has power to award a pecuniary compensation or charge upon the land. *Smith v. Smith*, 10 Paige, 470. *Larkin v. Mann*, 2 Id., 27. *Phelps v. Green*, 3 Johns. Ch., 303. Story's Eq. Juris., § 656a. In order to enable the court to make an equitable distribution between the parties the statute authorizes it, where the property cannot be divided "without great prejudice to the owners, to enter an order directing the referees to sell the premises," etc. Code §§ 814, 815. So far as the share of Mrs. McClary is concerned, being but a sixth interest, a strip eleven feet in width, it would be of very little value. As to her, therefore, a division could not be made without great prejudice, and it remained with the referees either to recommend a sale of the lot or that the share be attached to the portion assigned either to Susan J. Lynch or the defendant. No objection was made by the defendant to attaching the same to that portion of the lot assigned to him. Had objection been made no doubt the court would have required the referees to make a new allotment or recommend a sale of the premises. The interest of Mrs. McClary being assigned to the defendant, the consideration for the same was properly made a lien on the portion of the lot assigned to him. The right to make the balance due to the plaintiffs from the defendant for rents and profits a lien on his interest in the premises is

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not so clear, but no particular objection on that ground seems to have been made. No error is apparent in the proceedings, and the judgment is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	593
31	492
18	593
36	513
18	593
c89	769

ELBERT O. HAND, APPELLANT, v. G. WALTER PHIL-
LIPS ET AL., APPELLEES.

Attorney Fee. Under a statute which authorizes the allowance of an attorney's fee in certain cases, proportioned to the amount of recovery, the debtor cannot, by paying a considerable portion of the debt immediately preceding the rendition of judgment, defeat the recovery by the attorney of fees upon the entire sum for which, but for the payment, judgment would have been rendered.

APPEAL from Platte county district court. Heard below before POST, J.

A. W. Crites, for appellant.

George G. Bowman, for appellees.

MAXWELL, J.

This action was brought in the district court of Platte county to foreclose a mortgage upon certain real estate executed by Minerva A. Bailey and Gurdon B. Bailey, on the 18th day of February, 1879. The mortgage contains this provision: "And in case of a foreclosure of this mortgage a sum equal to ten per cent of the whole amount due shall be awarded in addition to the judgment, as an attorney's fee." It is alleged in the petition, in substance,

that Phillips purchased the mortgaged premises after the execution of the mortgage. No answer was filed by any of the parties, but on the day on which the decree was rendered the attorney for Phillips announced in open court that he had paid into court the sum of \$220 to apply, first, on taxable costs for clerk's and sheriff's fees, and second, on the amount found due on the note and mortgage. The court thereupon found "that all the facts stated in said petition are true; that at the time of the payment of the sum aforesaid into open court there was due from the defendant Gurdon B. Bailey to the plaintiff, upon the note and mortgage set forth in said petition, the sum of two hundred and ninety-five dollars for principal and interest;

* * that there still remains a balance of eighty-eight and $\frac{8}{100}$ dollars of the sum so found due as aforesaid to said plaintiff, still unpaid; that a sum equal to ten per centum of said last named sum should be allowed as an attorney's fee, and that the plaintiff is entitled to the relief prayed for by him as to the residue of said two hundred and ninety-five dollars, after deducting the sum so paid into court," etc. The sum of \$8.08 was allowed as attorney's fee. From the decree refusing to allow an attorney's fee on the entire sum due, the plaintiff appeals. This mortgage was executed before the act of 1879, p. 78, repealing the law providing for attorneys' fees took effect, consequently the contract is in full force. *White v. Rourke*, 11 Neb., 519. The question for determination, therefore, is, did a payment of a part of the mortgage debt immediately preceding the entering of the decree of foreclosure defeat the right to recover attorneys' fees?

The act of February 18th, 1873, providing for attorneys' fees was as follows: "That in all actions for the foreclosure of a mortgage or upon a written instrument for the payment of money only, there shall be allowed to the plaintiff, upon the recovery of judgment by him, a sum to be fixed by the court in addition to the judgment, not ex-

ceeding ten per cent of the recovery, as an attorney's fee, in all cases wherein the mortgage or other written instrument upon which the action is brought shall in express terms provide for the allowance of an attorney's fee." In a number of cases this court has decided that the attorney's fees allowed by the act were in the nature of costs and to be taxed as such and kept separate from the judgment. *Rich v. Stretch*, 4 Neb., 186. *Hendrix v. Ricman*, 6 Id., 516. *Heard v. Bank*, 8 Id., 10. *Dow v. Updike*, 11 Id., 95. Being in the nature of costs a portion of them accrued when the petition was filed. The proceedings to foreclose were then instituted. The defendants by failing to answer admitted that the cause of action had been correctly stated and that they had no defense. This being so, could they come into court immediately preceding the entering of the decree with the cause of action confessed upon the record, and pay the entire claim and costs, except the attorneys' fees? It will be observed that the contract is, that "in case of foreclosure of this mortgage a sum equal to ten per cent of the whole amount due shall be awarded in addition to the judgment as an attorney's fee. This contract is to receive a fair construction, one that will carry out the intention of the parties as far as it can be ascertained. The ten per cent is to be computed upon the amount due on the note and mortgage. This presumably is to be determined by the decree, as the facts as to the indebtedness as they existed when the petition was filed are presumed to continue until after the rendition of judgment. If, therefore, the defendant was indebted on the note and mortgage when the petition was filed to foreclose he ought not to be permitted to take advantage of his own default by then making part payment to defeat the attorney's fee *pro tanto*. In *Dakin v. Dunning*, 7 Hill, 30, Dunning brought an action of assumpsit against Dakin, who immediately after issue joined paid into court a certain sum of money, claiming that was all that he owed the plaintiff. At the trial, how-

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ever, the indebtedness was found to exceed the amount paid into court; the defendant insisted that the sum thus paid should be deducted by the jury and a verdict found for the balance only. The case was such that the deduction would have reduced the recovery below the amount necessary to entitle the plaintiff, under the statute, to costs. The court say (page 31): "The consequences that follow from the payment of money into court in a proper case is well settled in England. If the amount brought into court is accepted by the plaintiff in satisfaction of his demand, his costs are to be paid by the *defendant*, and the cause will thus be ended. But the plaintiff may insist that the amount paid is less than the actual indebtedness, and proceed in the cause to recover the residue. In such case if the sum paid into court is equal to what was due at that time the verdict is to be for the defendant, but if the sum paid is short of that amount the payment is to be allowed as a credit and a verdict found for the balance only,

* * * * The former practice of the English courts may have been well enough there and worked no injustice to either party, and it might be proper here if our law as to costs was the same as that of England. The sum brought into court belongs to the plaintiff in any event, and in England if he recovers anything beyond that sum he is entitled to costs. But it is otherwise in this court and in the courts of common pleas of the several counties. The plaintiff's right to costs in these courts often depends upon the amount of the recovery, and that right ought not to be impaired or affected by a payment into court unless the amount thus paid is equal to the whole sum due at the time." And it was held that the verdict and judgment should be for the whole amount of the plaintiff's claim, but that the defendant would be entitled to the benefit of the payment. In other words, that as the statute allowed attorneys certain fees in the nature of costs, proportioned to the amount of recovery, that the debtor by paying a part of

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the debt after the action was commenced could not prevent the attorney from recovering fees upon the entire sum. See also *Hand v. Dinely*, 2 Stra., 1220. *Sheriff v. Hull*, 37 Iowa, 176. This, we think, is the correct rule to be applied in cases of this kind. The payment, so far as the attorneys' fees are concerned, is to be applied as though the decree had been rendered, and this will dispose of the objection that the fees were to be fixed by the court upon the recovery of judgment, as the court at that time determines the amount due from the defendant to the plaintiff. But it may be said that the court has a discretion in the premises, and having fixed the fees that this court cannot review the order. In answer to this objection we will say that it clearly appears from the record that the court only allowed fees upon the balance remaining unpaid, and refused to allow the same upon the amount paid immediately preceding judgment. In this we think the court erred. The decree as to attorneys' fees is reversed, and as 10 per cent does not appear to be an unreasonable fee where the sum recovered is less than three hundred dollars, the plaintiff is allowed a sufficient sum with that heretofore awarded to amount to ten per cent on the decree, and the decree as thus modified is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

STATE, EX REL. ANTHONY REED, v. JOSEPH SCOTT,
COMMISSIONER OF PUBLIC LANDS AND BUILDINGS.

1. **Leasing State Lands:** MANDAMUS. The board of educational lands and funds will not be compelled by mandamus to award a contract of lease to a particular bidder, unless the sum bid is in excess of that fixed by statute, and is at least the full rental value of the land, and there is an abuse of discretion on the part of the board in refusing to execute the lease.

2. ———: PUBLIC LETTING: BIDS. Where a party at a public letting of educational lands was the highest bidder, but afterwards refused to accept the lease and pay the amount due thereon and perform the contract on his part, the board will not be compelled to accept a lower bid afterwards made by him for the same tract of land.

ORIGINAL application for mandamus.

Mason & Whedon, for relator.

William Leese, Attorney General, for respondent.

MAXWELL, J.

This is an original action brought to compel the defendant to execute a lease in the name of the state for the southwest quarter of section No. eight, in township ten north, range eight east, in Lancaster county.

The relator alleges in his application, in substance, that the land in question is a part of the endowment of the normal school of this state; that on the 29th day of June, 1871, one D. J. McCann purchased said land at public vendue for the sum of \$1,120; that McCann thereupon gave his note to the state for said sum of \$1,120, due ten years after date with interest at ten per cent, payable semi-annually in advance, and that he paid the interest on said note for one year in advance, and received from the superintendent of public instruction a certificate showing these facts, that in July, 1871, McCann assigned his interest in said land to one Murphy, who about the year 1872 assigned to one Cook; that the interest was paid on said note for the years 1871, 1872, 1873, and 1874, and no more; that in June, 1884, the board of educational lands and funds, after due notice to the parties interested, declared said contract forfeited and set aside, and notified the treasurer of Lancaster county of said forfeiture, and that said lands would be subject to lease in July, 1884; that prior to the 6th day of

July, 1884, said land had been appraised at \$7 per acre, and on that day the relator made his application to the county treasurer of said county to lease said land, and paid to the treasurer of the county \$33.60, that being six per cent on the appraised value of said land to the 1st day of January, 1886; and also paid said treasurer a bonus of \$50, making in all the sum of \$83.60, and at that time there was no other person who had made application to lease said land; that the treasurer of said county thereupon transmitted to Joseph Scott, commissioner, etc., said application and a duplicate receipt for the money paid by the relator, and requested said Scott to issue a lease for said land to the relator, which without reason and without any good or sufficient cause he refused and still refuses to do. It is also alleged that the relator is not the owner of 640 acres of state educational lands and would not be if he secured the land in question, etc. To this application the attorney general has filed an answer in which he alleges:

"That on the 7th day of June, 1884, the relator, with several other persons, each made application to lease for himself the land described in relator's application. That bids as high as 700 per cent were there bid by other parties on the appraised value of said land. That the relator did then and there offer to pay 1,000 per cent on the appraised value of said land. And in accordance with said bid of relator, it being the highest rate per cent on the appraised value of the land, the contract of lease for said lands was awarded to the said relator, and the commissioner of public lands and buildings did then and there prepare and sign a lease in duplicate to the relator, for said lands, and transmitted the same to the county treasurer of Lancaster county, and the relator, without any just cause or excuse, failed, neglected, and refused to make the first payment and sign the said lease, and after the expiration of thirty days the said lease in duplicate was by the said county treasurer returned to said commissioner. A copy of said relator's

application is hereto attached and filed herewith, and marked 'A.' Exhibit A is as follows :

"LANCASTER COUNTY, NEBRASKA, June 7th, 1884.

"To the Board of Educational Lands and Buildings :

"The undersigned desires to lease the following described school lands of the state, viz.: S. W. Qr. Sec. 8, Town. 10, range 8, Lancaster county, for which I will pay 1,000 per cent on the appraised valuation.

"ANTHONY REED,

"Post Office, Lincoln."

There are other allegations, to which it is unnecessary to refer. The case is submitted on the application and answer.

The relator does not allege in his application that the sum bid by him was the full rental value of the land, or that there were not higher bids than his for the board to act upon. The allegation is, "that at the time this affiant made his said application to lease said land there were no other parties desiring to lease said land, and no person had made application to lease the same." This is not sufficient to show that the relator was entitled to a lease. The board of educational lands and funds is a trustee for the sale and leasing of the land set apart for the support of educational institutions, and to justify the interference of a court there must be an abuse of the trust. This question was before this court in *State v. Scott*, 17 Neb., 686, and it was held that a writ would not be granted against the board unless there was an abuse of discretion, which, in our view, there was not in this case. It is the duty of the board to sell or lease the educational lands of the state for the highest price possible to be obtained, and increase and protect by all honorable means the funds for the support of the educational institutions ; and so long as the board is faithfully performing its duty in that regard, this court will refuse to interfere.

State v. Douglas County.

2. The allegations of the answer, if true, are sufficient to debar the relator from the relief prayed for. A party bidding must act in good faith, and if, being the highest bidder at a public letting, the contract is awarded to him, he must perform on his part, and cannot be permitted to let his bid lapse, and afterwards, when competition has ceased, put in a lower bid and compel the board to accept it. If, therefore, the allegations of the answer are true, the board on that ground alone should have rejected the relator's bid. The question whether normal school lands are subject to lease is discussed somewhat in the brief of the respondent, but as the question has not been very fully presented, and a determination not necessary to a decision in this case, it will not be considered. The writ must be denied.

WRIT DENIED.

THE other judges concur.

18	601
24	601
18	601
37	287

THE STATE, EX REL. THE ATTORNEY GENERAL, v.
THE COUNTY COMMISSIONERS OF DOUGLAS COUNTY.

1. **Constitutional Law : TAXES FOR INSANE.** The provisions of chapter forty of the Compiled Statutes of 1885, requiring the several counties in the state to pay the expense of the support and maintenance of insane persons having a legal settlement in the counties from which they are sent, are not in violation of the constitution, but are valid and binding upon the counties to which they apply.
2. **Insane: LIABILITY OF COUNTY.** A county is not chargeable with the support and maintenance of insane persons sent to the hospital therefrom, unless the legal settlement is found to be in such county.
3. ———: **TAX FOR SUPPORT.** The levy of a tax, under the pro-

visions of section 47 of chapter 40 of the Compiled Statutes of 1885, for the support of the insane having a legal settlement in such county, is a county tax, to be levied by the proper county officers; and if levied upon all the taxable property of the county alike, is not void for want of uniformity.

ORIGINAL application for mandamus to compel the board of county commissioners of Douglas county to allow the amount claimed to be due the state for the care and protection given to insane patients from that county. It was submitted to the court on the following agreed statement of facts:

"In this case it is stipulated and agreed by the relator and respondent, acting through their respective attorneys, Wm. Leese, attorney general, for the state, and J. C. Cowin for the respondents; that it is true as matters of fact:

* * * * *

"*Second.* There is no record or other evidence showing that the board of trustees of the insane hospital at any time fixed the sum to be paid per week for the board and care of patients. When the asylum burned down all records were destroyed, but the sum of \$4.00 per week was charged and demanded by the hospital up to February 29th, 1880. On that day the board of public lands and buildings adopted the following resolution:

"*Resolved,* That the secretary be and is hereby instructed to notify the auditor and superintendent for the hospital for insane that the board of public lands and buildings has reduced the price of board of patients at the hospital for insane to \$3.00 per week, to take effect December 1st, 1879.

"A certified copy was served upon the superintendent and thereafter \$3.00 a week was charged, to take effect December 1st, 1879.

"There was no other action taken by the board of pub-

lic lands and buildings with respect to fixing the sum to be paid per week, and \$3.00 per week is charged and demanded by the hospital in accordance with said resolution for all patients in the hospital.

“Third. From the year 1873 to the year 1885, inclusive, the state board of equalization and the state officers in that behalf provided, in deciding upon and fixing the rate of the general state tax (based upon the appropriation made each year by the legislature, which included all expenses of insane, including board and care of patients) to be levied for each current year, included in the rate for general state tax each current year, a sufficient amount to meet all expenses and expenditures of whatever nature connected with the maintenance of the insane hospital, and including the cost of board and care of patients, as fixed and demanded according to the facts agreed in the foregoing statement No. 2, and such sum was levied for that purpose as a part of the general state taxes each year, and was collected and appropriated and used for defraying said expenses, including the board and care of all patients, and there is no deficiency in that regard. The respondent Douglas county paid said general state tax, which included said expenses.

“Fourth. In addition to the foregoing levy, the state auditor each year notified the county clerk of respondent county of the amount charged against the county according to the second paragraph of this statement of facts, and demanded that such amount be added to the general state tax, which already included such costs and expenses as stated in paragraph three hereof, and such amount was levied in Douglas county for 1873 to 1876, inclusive, as an insane hospital tax, and the amount paid by Douglas county under the last mentioned levy into the state treasury from November 30th, 1873, to the present time was \$4,227.75 and no more. And the amount certified by the superintendent to the auditor, and by the auditor to the

respondent from November 30th, 1873, until November 30th, 1876, was the amount of \$7,035.33.

"Fifth. The rate of general state levy which included said insane hospital expenses was sufficient, exclusive of the tax and levy provided by section 47 of chapter 40 of the Compiled Statutes of Nebraska, to meet the appropriations made by the legislature for each year, which included all expenditures and expenses for the insane hospital, including the board and care of all patients.

"Sixth. It is further agreed that if the court shall finally determine that the county respondent is under obligations to levy a tax as provided by section 47, chapter 40, entitled 'Insane,' and shall further determine that the county respondent is entitled to be credited for the amount it has paid toward the support of the insane, by reason of the amount for the support of the insane being included in the general state tax according to paragraph three of this agreement and stipulation, and paid by the county and used in the support of the insane inmates in said hospital, then and in that case the case may be referred for the purpose of ascertaining the amount of such credit to which said county would be entitled."

William Leese, Attorney General, and T. M. Marquett,
for the State.

The validity of the tax has been determined. *B. & M. R. R. v. Cass County*, 16 Neb., 137. *Same v. Saunders County*, Id., 125. The levy of the tax is directed by Laws 1885, Ch. 70. Neglect of county board for previous years no defense. *State v. Franklin County*, 35 Ohio State, 468. *State v. Harris*, 17 Id., 615. *People v. Supervisors*, 8 N. Y., 330. *Same v. Same*, 10 Wend., 366. The remedy is by mandamus. *Clark v. Buffalo County*, 6 Neb., 463. *Elmore v. Zeigler*, 52 Ala., 227. *State v. Wilson*, 17 Wis., 709.

J. C. Cowin, for respondents.

From the agreed statement of facts it will be seen that respondent is not resisting this writ to evade the payment of the expenses and costs of the board and care of the insane patients having legal settlement within its boundary, or any part of its just proportion of the expenses of the government. The state officers, thereunto authorized by law, themselves added to the general state tax all these expenses levied for these expenses, and the tax has been yearly collected by the county, paid into the state treasury, and used to defray such expenses. By this levy Douglas county has probably paid more than it would have paid under a levy made under section 47. So that Douglas county appears here to resist a new levy for a tax it has once paid and discharged in full. The great civil war, which put our constitution to the severest test, never in its most critical and trying period, when every means within constitutional authority were resorted to for the purpose of raising a revenue to carry on a gigantic war, never even then, or any time, subjected the constitution and the people to the test of a measure so monstrous as to require a tax to be twice paid, either by direction or indirection; and yet it is sought to be enforced in enlightened Nebraska, against citizens always willing to bear their just proportion of the burden of the government, and in a time of profound peace, and in the most summary proceeding. Such a proceeding is not taxation but confiscation. Excess of taxation is void. *Cooley Cons. Lim.*, 644. *B. & M. v. York County*, 7 Neb., 487. *Hammitt v. Philadelphia*, 65 Penn. State, 151. Referring to the constitution, Art. 5, § 19; Art. 9, §§ 1, 5, 6, 7, and Art. 3, § 19; *Comp. Stat.*, chaps. 40, 83; *Comp. Stat.*, Ch. 77, §§ 74, 75, 76, the respondents claim:

1. That the revenue provided for board and care of the insane is a "State Tax." *Cooley Cons. Lim.*, 496. *Mur-*

ray v. Lehman, 61 Miss., 283. *State v. Liedtke*, 9 Neb., 468. *Dundy v. Richardson Co.*, 8 Neb., 508.

2. As such it must be levied under Const., Art. 9, § 1. And see *Turner v. Althaus*, 6 Neb., 77. *Clother v. Maher*, 15 Id., 6. *Covell v. Young*, 11 Id., 511. *Fletcher v. Oliver*, 25 Ark., 289. *People v. McCreery*, 34 Cal., 432.

3. It is incompetent for the legislature to authorize a local tax for a general state purpose. *Cooley Taxation*, 104. *Dorgan v. Boston*, 12 Allen, 223. *Hammett v. Philadelphia*, 65 Penn. State, 146, 151.

4. The tax is illegal, for it is not competent for the legislature to impose a county tax for county purposes. *Cornell v. People*, 107 Ill., 372. *Hasbrouck v. Milwaukee*, 13 Wis., 42. *Pope v. Phifer*, 3 Heisk., 682.

5. The tax is a violation of the 14th amendment to the constitution of the United States. The revenue sought to be enforced taxes a part of the tax payers twice. *Durkee v. Janesville*, 28 Wis., 464. This tax would make a different rate for the general fund tax in the different counties. *Burroughs Taxation*, Ch. 5.

William Leese, Attorney General, and *T. M. Marquett*, in reply.

The county is simply a political division of the state, organized as a part of the machinery of the state for the performance of functions of a public nature. *Barton Co. v. Walser*, 47 Mo., 189. *Laramie Co. v. Albany Co.*, 92 U. S., 307. The state may require counties to take care of its insane, etc. *Poor Commissioner v. Detroit*, 28 Mich., 234. *City of Alton v. Madison Co.*, 21 Ill., 115. The power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with by the judiciary. *Cooley on Taxation*, 110. *People v. Supervisors*, 20 N. Y., 252. *People v. Lawrence*, 41 N. Y., 187. *People v. Central R. R.*, 43 Cal., 398.

REESE, J.

The questions involved in this case are of great importance to the state and to the people of the several counties, as they involve, among others, the question of the *power* of the legislature to impose upon the people of the several counties the expense of the maintenance of insane persons at the state hospital, in addition to the general state tax levied for the purpose of maintaining this institution.

While we have carefully investigated all the questions presented, yet, for want of sufficient time at our disposal to discuss each one with that degree of care to which it seems to merit, we must be content with a very brief statement of our conclusions, without any elaboration.

From the agreed and stipulated facts it appears that the amount of tax levied by the state authorities has been sufficient to maintain the hospital, paying all the expense of board, etc., of all the patients, so that it has not been a matter of absolute necessity for its maintenance that any further burdens should be imposed upon counties having patients there under the provisions of section 47 of chapter 40 of the Compiled Statutes of 1885. It must be borne in mind that the question here is simply one of the *power* of the legislature to impose this tax. All suggestions as to its expediency must be banished from the case. The legislative department, being one of the co-ordinate branches of the government of the state, cannot be controlled by the courts so long as it acts within its jurisdiction and the limitations of the constitution. In fact, within those limits it is the supreme and controlling power of the state, and both the executive and judicial must yield a willing obedience to its mandates.

It is insisted that as a levy of tax has been regularly made for the maintenance of the hospital, it is not within the power of the legislature to again tax the people of the several counties for the maintenance of the insane sent to

it from such counties; that it is double taxation, and in effect a confiscation of the property of the citizen, and that all such taxation must necessarily be void. It must be conceded that if the tax is in excess of the power of the legislature it is void, and if it is a double tax for the same purpose it is in excess of the legislative power, and therefore void. While our judgment may not, and does not, approve the method adopted for the support of the hospital for the insane, and while it would seem that the burden is made unnecessarily heavy, yet, as we have suggested, the question of propriety is for the legislature.

By the statement of facts agreed upon, it appears that the taxes imposed by the state at large are, and have been, sufficient for the support and maintenance of the hospital, and that in addition thereto each county is required to impose a tax sufficient to pay the expense of its patients who are there confined.

It is clearly within the power of the legislature to provide for the maintenance of the insane by general taxation of the state, and to relieve the several counties from the burden, except as they bear their proportion with the other counties of the state; or to require each county to maintain its own insane in hospitals provided by them; or to pay the expense of the maintenance of their insane in a hospital provided by the state. In this each state has adopted the course which to its legislature has seemed most judicious. And we think it is clearly within the legislative power to provide by law and taxation, in the first instance, for the support of the insane by the state, and then require the counties, which otherwise would have to support the insane having a residence within their borders, to repay the state the amount thus expended. Any other view would leave the care of this, the most unfortunate class of our citizens, to the will and caprice of the county boards of the several counties in the state, which would result in anything but a harmonious system of caring for them. We

have carefully examined all the authorities cited by the respondent, and are unable to arrive at any other conclusion. This seems to be the policy of our state, and we think the right to adopt such a policy cannot be successfully questioned. The wrong, if any exists, seems to be an error of judgment in the amount of tax necessary to be levied by the state to insure the carrying out of the purpose of the law. This may be in part the result of oversight, or it may have become necessary by the failure of the several counties to collect and pay over the amounts required by the section (47) above referred to. Perhaps the latter. Again, there are many patients whose residence cannot be ascertained, and for whom provision must be made. It would be clearly unjust to require the county in which the insane person is apprehended to pay the expense of his maintenance; this must be done, if at all, by state taxation. It is very properly provided by section 48, Id., that the estates and relatives of insane persons, when able to do so, shall reimburse the county for the money paid, thereby making the counties the losers only to the extent of money paid out for those who are unable to support themselves.

Other questions are presented by the very able brief of counsel for the respondent which require attention, and will be briefly noticed.

It is claimed that the tax required to be levied by section 47 is a state tax, and therefore the county has no authority to make the levy, and further, that such levy would be a violation of the fundamental requirement that taxation shall be uniform throughout the state. While it is true that the hospital for the insane is, as argued by the respondents, a state institution, yet, as we have seen, the maintenance of the insane is not necessarily a state burden, and therefore it is within the power of the legislature to require that the tax may be levied and collected by each county for the purpose of reimbursing the

state, and we think it is also within the power of the legislature to require the tax so levied to be placed with other taxes going to the state in order that it may be withdrawn from the control of the county officers, and set apart at the outset to the use for which it is levied. This being true, the requirement of uniformity is not violated, as the tax is uniform throughout the taxing district in which it is levied. This is all that is required.

Again, it is claimed that if the tax is a county tax, it is not competent for the legislature to make the levy, that such tax can only be imposed by county authority. This is true, but by an examination of the law it will appear that the tax is not levied by the state or its officers. The state auditor is required to notify the county clerk of each county the amount due from it to the state. The county is charged with the amount in gross. The proper estimates of the amount of tax necessary to pay the indebtedness are made by the county officers, and when the percentage of levy is ascertained by them, it is their duty to levy the tax and place it against the property in the county. The tax is not levied by the state but by the county, for the purpose of paying an indebtedness due the state and ascertained by its officers.

The suggestion that the imposition of the tax provided for in section 47 is in violation of the fourteenth amendment of the constitution of the United States has, we think, been sufficiently noticed by the foregoing. There are no unequal exactions or burdens imposed by the section.

It is urged that if the writ is allowed as prayed for in this case, and the other counties of this state are required to pay the amounts charged to them, it will enforce the payment of a large amount of money into the state treasury which is not necessary, and has, virtually, already been paid in the form of taxation under the general tax levy of the state, as many other counties, like the relator, have failed to levy the tax, or if levied and collected, to pay

the same to the state treasurer. This fact may account for the high rate of taxation made necessary for the support of the hospital for the insane. If the tax had been levied, and the money paid over by the county treasurers as required by law, it would have materially affected the levy by the state board of equalization, for we must presume they were governed by the actual necessities of the case, and by their official oaths. Section 75 of the revenue law (Chapter 77, Compiled Statutes of 1885) provides that the rate of general state tax shall be sufficient to realize the amount necessary to meet appropriations. It cannot be supposed that the state board of equalization will impose an unjust or oppressive tax, or that they would levy the full amount necessary to meet all the expenses of the state institutions. if a large amount of money was in the treasury to the credit of the funds from which the appropriations were made, but, in the language of the statute, "an amount necessary to meet the appropriations" would be the full measure of their duty. An unreasonable excess could and should be controlled by the courts. We fully agree with counsel that it is not in accordance with the spirit of the institutions of this country that large amounts of money should be wrung from the people by taxation and placed in the public treasuries, for such a condition is universally followed by extravagance in public expenditures. But this must, in the first instance at least, be left to the wisdom of the proper department of the government.

By the stipulation of facts it is shown that a number of patients are, and have been, in the hospital, the charges for whose keeping are made to Douglas county, while the records show that the legal settlements of such persons were not in the county named. By section 23 of the act under consideration it is made the duty of the commissioners of insanity of each county to ascertain the legal settlement of insane persons, and certify the same to the

superintendent of the hospital. If it is not in the county, the expense of his maintenance should not be charged to it. It is also provided that if the legal settlement is in another county in the state, the expense should be charged to such county ; and by section 27, it is provided that if the insane person has no legal settlement, or if the settlement cannot be ascertained, the person shall be supported at the expense of the state. By this the county commissioners of insanity are the judges of the place of legal settlement. There is no suggestion of want of good faith on their part, or a failure to honestly decide the questions before them, yet we find that these provisions of the law have been ignored, and Douglas county is called upon to answer for the maintenance of persons for whose support they were, and are, in no sense, legally bound. Of this class we notice the following :

Fred Larson, legal settlement, unknown.....	\$ 113 72
Immanuel Harrison, same as above.....	37 15
Boraora Evans (or Homar), same as above.....	601 68
Cristina Halquist, legal settlement, unknown.....	1564 10
Marietta Albra (or Aubray), legal settlement, unknown, and so stand in commission's warr't..	1537 23
Patrick Bickman, legal settlement found by the commissioners of insanity to be in Chicago..	770 86
Amos B. Dunn, legal settlement found by commissioners of insanity to be at Minneapolis, Minn	50 29
Amos Robinson, legal settlement, unknown, and so stated in warrant of admission	89 16
Cornelius Morse, legal settlement, unknown, and so stated in warrant of admission	68 58
N. S. Minor, legal settlement, Erie county, Penn., and so stated in warrant of admission	188 10
John Johnson, agreed to be erroneous.....	22 29
John Bunse, legal settlement, Germany, and so found by the commissioners of insanity.....	14 15
Making a total of.....	\$5057 31

Which is sought to be imposed upon Douglas county by the management of the hospital, without any authority of law. The fact that the examining physician may have certified that the legal settlement of some were in Douglas county can afford no authority for the charge. The law makes it the official duty of the commissioners, and their finding and certificate must control, unless it should be made to appear that they were untruthful upon a further investigation of the facts.

We therefore hold that under the law, as it now exists, each county in the state is liable to the state for the support of all insane persons sent to the hospital from such county, having a legal settlement therein, and that it is the duty of the county officers to levy, collect, and pay over to the state treasurer the amount necessary to pay the same, and that it is the duty of the respondents to levy the necessary taxes within the constitutional limit to pay the same, which is found to be \$31,499.03, unless by agreement of parties, or upon reference, if so desired, a different sum shall be found to be due. But that no county is legally held for the support of those sent to the hospital by its officers, whose legal settlement is not in such county,

As respondents have signified their willingness to abide the determination of this case and levy such tax as may be ordered without a writ being issued, the writ of mandamus will be withheld and not issued unless in case of a refusal to comply with the judgment of the court.

JUDGMENT ACCORDINGLY.

MAXWELL, CH. J., dissenting.

I am unable to give my assent to the conclusion reached by the majority of the court and will state the reasons for my dissent. Sec. 46 of the act for the government of the hospital for the insane provides that, "The board of trustees shall from time to time fix the sum to be paid per

week for the board and care of patients, and to arrive at such sum shall estimate the total outlay as far as possible from the sums actually paid per annum, and the weekly sum so fixed shall be the sum said hospital shall be entitled to demand for the keeping of any patient, and the certificate of the superintendent, attested by the seal of the hospital, shall be evidence in all places of the amount due as fixed."

Sec. 47 provides that, "The superintendent shall certify to the auditor of state on the first days of March, June, September, and December the amount (not previously certified by him) due to said hospital from the several counties having patients chargeable thereto, and said auditor shall pass the same to the credit of the hospital. The auditor shall thereupon notify the county clerk of each county so owing of the amount thereof and charge the same to said county, and the board of county commissioners shall add such amount to the next *state tax* to be levied in said county, and pay the amount so levied into the *state treasury*."

Under these provisions the sum of \$4.00 per week for each patient sent to the hospital was charged to the county sending the same, and this continued till December 1st, 1879, and since that time the charge has been \$3.00 per week. It is conceded that the sums thus charged, if collected, will pay all expenses of the hospital. In *B. & M. R. R. Co. v. Saunders County*, 16 Neb., 123, and *B. & M. R. R. Co. v. Cass County*, 16 Neb., 136, this tax was held to be a valid charge against a county. So far as this case is concerned it can make no difference whether it is a county or state tax. It is in fact a charge against each county based on the number of patients sent to the hospital. It is not material whether called a state or county tax, as the money paid by the tax payers is levied and collected for the support of the hospital.

By the third paragraph of the stipulation of facts in this

case it appears that, "From the year 1873 to the year 1885, inclusive, the state board of equalization, and the state officers in that behalf provided, in deciding upon and fixing the rate of the general state tax (based upon the appropriation made each year by the legislature, which included all expenses of insane, including board and care of all patients) to be levied for each current year, included in the rate for general state tax each current year a sufficient amount *to meet all the expenses and expenditures of whatever nature connected with the maintenance of the insane hospital*, and including the cost for board and care of all patients as fixed and demanded according to the facts agreed in the foregoing statement No. 2, and such sum was levied for that purpose as a part of the general state tax the same as other general state taxes each year, and was collected and appropriated and used for defraying said expenses, including the board and care of all patients, and there is no deficiency in that regard. The respondent Douglas county paid said general state tax, which included said expenses."

It will be seen that the state officers in fixing the rate of taxation added to the general state tax the whole amount required each year for the support of the hospital for the insane. This tax has been collected each year and paid into the state treasury, and drawn out on the warrants of the auditor to defray the expenses of the hospital. The amount thus paid by Douglas county, so far as can be ascertained, is about equal to the aggregate of the charges against it for patients sent from that county to the hospital. That county, therefore, has, at least to the extent of the taxes above referred to, already paid and discharged the tax for the support of hospital for the insane. It is conceded that no part of the money now sought to be collected *is necessary* for the support of the hospital; but that as the statute makes the counties liable for patients sent by them to that place, that notwithstanding the expenses have

been paid by a levy on all the property of the tax payers in the state, still the counties are liable to the state upon this claim. In answer to this objection we must consider that all appropriations made by the legislature are of a specific sum for a specific purpose, of which only "so much thereof as may be necessary" is to be expended.

Only so much, therefore, as was necessary to supply any deficiency that may have arisen from inability to collect some portion of the sum charged against each county for patients sent by it to the hospital should have been levied as a general state tax for the support of the hospital. This would have been a very small sum. If any of the counties failed to levy the tax to pay the charges, proceedings by mandamus in a proper case would have compelled action. As the most of the counties of the state failed to levy taxes to pay the charges for patients sent by them, and from uncertainty no doubt as to the validity of the provision making patients a county charge, the state board have caused a sufficient amount to be levied each year to pay all expenses of the hospital. No doubt, under the circumstances, they were justified in doing this. But the tax thus levied and collected from a county for the support of the hospital should be credited to it against the charges for patients sent by it to the hospital. The legislature never intended that the amount charged against each county for patients should be collected, and *also* an equal amount for the same purpose—the support of the hospital—by a general tax. And the legislature, under our constitution, has no authority to impose double taxation. Sec. 1, Art. 9 of the constitution provides that, "the legislature shall provide such revenue as may be needful by levying a tax by valuation," etc. And Sec. 19, Art. 3, provides that, "each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter. And when-

ever it is deemed necessary to make further appropriations for deficiencies, the same shall require a two-thirds vote of all the members elected to each house, and *shall not exceed* the amount of revenue authorized by law to be raised in such time." That is, the legislature is absolutely prohibited from making appropriations beyond "the expiration of the first fiscal quarter after the adjournment of the next regular session."

Sec. 22, Art. 3, provides that, "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon, and no money *shall be diverted* from any appropriation made for any purpose, or *taken from any fund whatever*, either by joint or separate resolution," etc.

The constitution limits the power of the legislature in imposing taxes to such as may be necessary, and limits the time for which they may be imposed so that no appropriation can be made for a longer period than two years and a quarter. Sec. 9, Art. 3, also provides that bills appropriating money "shall originate only in the house of representatives." Now, will it be seriously contended that as the legislature is restricted by the constitution to such appropriations as are *needful*, and possesses no power to divert money raised for one purpose to a different one, and has no authority to make an appropriation beyond the first fiscal quarter after the adjournment of the next regular session, that it can evade the law by indirection and impose twice the amount of taxes necessary for any specific purpose. If so, a sufficient amount may be raised by direct tax to support the penitentiary, and a charge *per capita* against each county for the prisoners sent by it sufficient in the aggregate to pay all expenses, and the same rule may be applied to the deaf and dumb and blind asylums and other institutions of the state, and the treasury be filled with money for which there was no use whatever.

There is no power of government more liable to abuse than the taxing power; hence the constitution limited and restricted it. The effect of this decision, however, will be, I fear, to break down the barriers, and under various subterfuges fill the treasury with funds not required by the necessities of government. It may be said, however, that Douglas county sent a large number of patients to the hospital and is indebted to the state for their support. The answer to this is, that the charges against Douglas and other counties were for the support of the hospital—the tax to be levied for that purpose, a state tax for that identical purpose was levied on Douglas and other counties, and has been collected and paid. If Douglas county had not paid this state tax there would be force in this argument, but having paid the tax and thereby contributed its full proportion to the support of the hospital it has performed its full duty in that regard. The fact that the taxes were levied and collected—not as a charge against the county for patients sent to the hospital, but as a direct tax for its support, can make no difference where the money when collected in either way is to be applied to the same purpose—the support of the hospital. In either way the money is levied and collected by the counties and paid over by them to the state treasurer. The burden in either case must be borne by *the tax payers*, and having discharged their obligations once in that regard the legislature possesses no power to impose the same duty in a different form for the same purpose.

But it is said some of the counties have paid this tax, and others not, and it would be unjust to such counties as have paid to permit the others to avoid paying the tax. It appears that but a very small proportion of the counties have paid the per capita charge, there being less than \$150,000 in all collected. This the legislature can readily adjust by giving such counties credit upon the tax to be hereafter collected, so that there is no difficulty in that regard.

Stettinische v. Lamb.

So in regard to any inequality in the burden in the different counties, as where the direct tax will amount to more or less than the charges for patients sent from that county. But to the extent of the direct taxes levied and paid by a county for the support of the hospital it should be credited as against any liability for patients sent from that county.

The attorney general has done well to call attention to these matters, in order that the validity of law may be tested and the proper steps taken to prevent double taxation. The writ should be denied.

AUGUSTE STETTINISCHE, APPELLANT, V. WILLIAM LAMB,
APPELLEE.

1. **Adverse Possession: TITLE.** Adverse possession of real estate, if continued without interruption for the length of time prescribed by the statute for the enforcement of the right of entry, is evidence of a fee.
2. ———: **CASE STATED.** Where the purchaser of a lot upon receiving a deed therefor erects a building thereon, and enters into possession, and afterwards sells and conveys the premises, a number of transfers of the property being thereafter made, and the building at times being vacant, but no interruption by an adverse claim to the title of the occupant, *Held*, That the possession was continuous, and after the expiration of ten years the occupant possessed the fee.
3. **Real Estate.** Possessions may be tacked if one comes in under the other and the possessory estates are connected and continuous.
4. ———: **PRINCIPAL AND AGENT: PURCHASE BY AGENT.** A party will not be permitted to purchase property and hold it for his own benefit, when he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account. *Columbus Co. v. Hurford*, 1 Neb., 146.

APPEAL from Gage county. Heard below on report of N. K. GRIGGS, referee.

18	619
21	683
23	747
18	619
27	63
18	619
31	809
18	619
33	868
18	619
36	875
18	619
49	377
50	517
18	619
60	97
60	368

J. R. Webster, for appellant.

1. We contend possession once established in *Mrs. Towle* by material acts of visible and notorious ownership must be presumed to continue until open, notorious, adverse is *proved to have taken place in some one else*. *Clements v. Lampkin*, 34 Ark., 598, 602. *Marston v. Rowe*, 43 Ala., 271, 285. *Rayner v. Lee*, 20 Mich., 384, 386. No attempt is made to prove adverse possession in any one else save Wallis' own agent, and only by hearsay evidence of his declarations.

2. Reasonable lapse of time between successive tenancies (as in this case, from April 24 to May 1st or May 15th) does not break the continuity of adverse possession. *De La Vega v. Butler*, 47 Tex., 529, 534.

3. Possession must be suitable to the character of the *locus quo*, and the use to which the premises are put, and such possession is proven. *Webb v. Richardson*, 42 Vt., 473, 465. *Holdfast v. Shepherd*, 6 Iredell, 361. *Draper v. Shoot*, 25 Mo., 197, 199. *Brumagim v. Bradshaw*, 39 Cal., 24, 45-6. *Beaupland v. McKeen*, 28 Pa. St., 124, 134. *Ewing v. Burnet*, 11 Peters, 41, 53. *Stephens v. Leach*, 19 Pa. St., 262, 265. These premises being leased to parties for business purposes, vacancy for a short time at change of tenancies is not abandonment. By holding the premises out for rent, and soon renting the same, dominion is asserted, possession maintained. The hostile flag was kept flying. Without proof of actual ouster, that is enough. The evidence shows that T. O. Wallis obtained his possession, under employment of plaintiff, for purpose of controlling and renting the premises, he being a real estate agent. That being so, his occupation was not adverse to plaintiff. He could not set up an adverse possession upon a possession so acquired. So that his possession and Spoerri's was that of plaintiff, and not adverse to plaintiff, and plaintiff's

possession continued to November 16, 1877, when Lamb received attornment of plaintiff's tenant.

L. W. Colby, for appellee, argued the cause on the facts, and upon the law relative to adverse possession cited *Sedgwick and Wait on Trial of Title to Land*, §§ 731, 737, 738, 740, 745.

MAXWELL, J.

This action was brought in the district court of Gage county by the plaintiff against the defendant to cancel certain tax deeds on lot 1, block 66, in the city of Beatrice, and to cancel a quit-claim deed executed in 1881 by one G. W. Mumford to said defendant for said lot. The defendant claimed title under certain tax deeds and the deed from G. W. Mumford. The cause was referred to a referee, who found the facts as follows:

"1. That the site of the town of Beatrice, of which lot one in block sixty-six, now in controversy, is a part, was entered by Herman M. Reynolds, as mayor of said town, on the 12th day of August, 1859, and the same was afterwards, to-wit, on the 28th day of January, 1862, patented to said Herman M. Reynolds, as such mayor, such conveyance being made by the government of the United States.

"2. That on the 30th day of March, 1860, George W. Mumford became the legal owner of the lot in controversy, by deed of conveyance made out, executed by the said Herman M. Reynolds as such mayor aforesaid.

"3. That on the 28th day of November, 1881, the said George W. Mumford, who had not previously parted with the title to said lot, conveyed the same by deed of quit-claim to the defendant William Lamb.

"4. That on the 21st day of June, 1865, one I. P. Mumford conveyed the lot in controversy by warranty deed to Catherine Towle.

"5. That on the 12th day of September, 1867, said Catherine Towle and Albert, her husband, conveyed the said lot by warranty deed to Joseph Saunders.

"6. That on the 8th day of July, 1869, said Joseph Saunders and Emmers, his wife, conveyed the said lot by warranty deed to D. S. Jones and L. C. Reinbold.

"7. That on the 25th day of September, 1869, said D. S. Jones conveyed the undivided one-half of said lot by warranty deed to Chas. Vogt.

"8. That on the 28th day of August, 1870, said Charles Vogt conveyed the undivided one-half of said lot by warranty deed to L. C. Reinbold.

"9. That on the 14th day of October, 1871, J. L. Webster, register in bankruptcy, conveyed the said lot to C. P. Patterson, assignee of the estate of L. C. Reinbold and Caroline Vogt.

"10. That on the 25th day of December, 1872, said C. P. Patterson, as assignee as aforesaid, conveyed said lot by deed of quit-claim to Henry N. Shewall.

"11. That on the 27th day of December, 1873, said Henry N. Shewall conveyed the said lot by deed of quit-claim to the said plaintiff, Auguste Stettinische.

"12. That on the 9th day of September, 1875, defendant William Lamb purchased the said lot at tax sale for the taxes assessed thereon for the year 1874, and that at the time of such purchase by said Lamb the taxes assessed upon the said lot for the years 1872 and 1873 were delinquent and unpaid, and were not included in the amount for which said lot was sold as aforesaid to said defendant William Lamb.

"13. That on the 16th day of November, 1877, Hiram P. Webb, treasurer of Gage county, Nebraska, conveyed the said lot by treasurer's tax deed to said defendant William Lamb under and by virtue of said tax sale of September 9th, 1875, but said tax deed fails to show where the said lot was sold by the said treasurer of said Gage county.

"14. That on the 28th day of January, 1879, John Ellis, as treasurer of Gage county, Nebraska, conveyed the said lot by treasurer's tax deed to said defendant William Lamb under and by virtue of the said tax sale of September 9th, 1875.

"15. That on the 9th day of August, 1875, said defendant William Lamb began an action in this court against Charles Vogt and William Vogt, to have the lot now in controversy held to be the property of said Charles Vogt, and to have the same ordered to be sold to pay certain indebtedness owed by said Charles Vogt to said William Lamb.

"16. That on the 12th day of Oct., 1876, said William Lamb made the plaintiff herein a co-defendant with said Charles Vogt and William Vogt, by the filing of an amended petition in the cause last above mentioned. The object of the said cause was not, however, changed by the filing of said amended petition.

"17. That I. P. Mumford, who made the conveyance of the lot in controversy to Catherine Towle, was never in possession of said lot.

"18. That after said conveyance by said I. P. Mumford, the said Catherine Towle took actual possession of said lot either in the years 1865 or 1866 (the evidence does not show which), and erected a store building thereon, and continued in the actual possession and occupation thereof until she conveyed the same to Joseph Saunders.

"19. That immediately after the conveyance last mentioned, the said Joseph Saunders took actual possession of the said lot, and continued actual occupation and possession thereof until the date of the conveyance to D. S. Jones and L. C. Reinbold.

"20. That the evidence does not disclose when, if at all, D. S. Jones and L. C. Reinbold took actual possession of the lot in controversy under the conveyance from said Joseph Saunders and wife, nor does the evidence disclose

how long, if at all, they were in the actual possession of said lot prior to September 28th, 1869, the date of the conveyance by said D. S. Jones to Charles Vogt.

"21. That the evidence shows that Jones and Vogt paid the taxes assessed upon said lot for the year 1870; but it fails to disclose what portion of the time, if any, said Charles Vogt and L. C. Reinbold were in the actual possession of said lot prior to August 28th, 1870, the date of the conveyance by said Charles Vogt to L. C. Reinbold."

The referee further finds that the evidence fails to show when L. C. Reinbold & Co. took possession, or that C. P. Patterson, assignee, or Henry N. Shewall were ever in actual possession. He also finds that the premises "became vacant April 1st, 1874, and so remained for a short time; that thereafter T. O. Wallis had the actual possession thereof, and claimed to be the owner of said premises; that said T. O. Wallis then rented the premises to movers for a number of nights; the said T. O. Wallis while claiming to be the owner of said premises, and on the 15th day of May, 1874, rented them to one Agatha Spoerri, and collected and received from her two months rental therefor; that during the said two months the said Agatha Spoerri remained in actual possession of said premises as tenant of said T. O. Wallis; that after the expiration of the said two months the said Agatha Spoerri paid rent for a time, but how long the evidence does not disclose, to Charles Vogt, upon his demand; that owing to a controversy in regard to the title of said premises the said Agatha Spoerri declined to pay rent to any one thereafter; that said Agatha Spoerri and Jacob, her husband, paid for said Charles Vogt certain taxes assessed upon said lot." The referee found that the defendant had been in the actual possession of the premises ever since the 16th day of November, 1877, and that I. P. Mumford, and those claiming under him, had not been in actual possession continuously for ten years prior to November 16th, 1877, consequently that the

defendant was entitled to judgment. Exceptions were filed to the report, which were overruled, and the report confirmed. The plaintiff appeals.

The testimony of George W. Mumford was taken by deposition. He testifies that in March, 1864, he gave his "brother Isma Mumford a power of attorney to sell any property I then had in Gage county, Nebraska, which included any and all lots I then or since have held or owned in Beatrice." There is no power of attorney on the records of Gage county from George W. Mumford to I. P. Mumford, and it is claimed that the last named person is dead, hence it is impossible to determine upon what authority I. P. Mumford made the deed to the lot in question to Mrs. Towle. And as George W. Mumford, who is a non-resident of the state, seems to have entrusted his brother I. P. with full power and authority to dispose of his real estate in Gage county, he was unable to state the facts in regard to the conveyance. This link being wanting in the plaintiff's chain of title, she does not attempt to supply it, but claims that she has a full and complete title by adverse possession.

The doctrine is now well established that what the law deems a perfect possession, if continued without interruption for the length of time prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. Angell on Lim., § 380. The reason is, such possession supposes an acquiescence in all persons claiming an adverse interest, and upon this acquiescence is founded the presumption of the existence of some substantial reason for the assertion of the claim of title. *Id.* To constitute adverse possession it must be open, notorious, exclusive, and continued without interruption for the statutory period. *Gatling v. Lane*, 17 Neb., 77. *Haywood v. Thomas*, *Id.*, 237. *Horbach v. Miller*, 4 *Id.*, 32. *Stokes v. Berry*, 2 Salk., 421. *Graffins v. Totenham*, 1 W. & S., 488. There must be an actual entry in order that an ouster may

be made and an adverse possession begun. *Miller v. Shaw*, 7 S. & R., 129. *Attemas v. Campbell*, 9 Watts, 28. *Nepean v. Doe*, *Taylor v. Hord*, 2 Smith L. C., 583, and notes. And such possession must be continued for the full statutory period. The character of this continued possession necessarily must be governed to some extent by that of the real estate. It is unnecessary to discuss that question in this case, a building having been erected on the lot and possession thereof taken by the party under whom the plaintiff claims title. The weight of authority in this country sustains the doctrine that possessions may be tacked if one comes in under the other, and the possessory estates are connected and continuous. *Brandt v. Ogden*, 1 Johns., 156. *Jackson v. Thomas*, 16 Id., 293. *Winslow v. Newell*, 19 Vt., 164. *Ward v. Bartholomew*, 6 Pick., 410. *Overfield v. Christie*, 7 S. & R., 173. *McCoy v. Trustees*, 5 Id., 254. That is, the possession need not be continuous for the period of limitation in any one occupier. It is sufficient that the possession during that period be in the occupier and those under whom he claims, *McNeeley v. Langan*, 22 O. S., 32.

Let us apply these principles to the case at bar. The testimony clearly shows that in 1865 or 1866 I. P. Mumford conveyed the lot in question to Mrs. Towle; that soon thereafter they erected a building on the lot, and entered into possession of the same; that this building continued in the possession of Mrs. Towle, and those claiming title through her, until November 16th, 1877, when the defendant took possession under a tax deed. The testimony shows that at times, varying between a few days to, in one instance, some months, the building was vacant, but there is no proof whatever that the possession of the plaintiff, or those under whom she claims, was interrupted. The hearsay statement purporting to have been made by T. O. Wallis will be noticed hereafter. Where a party erects a building on a lot, and takes actual possession of the same

as his own, the fact that afterwards he, or those claiming under him, rent the property, or, in case it is unoccupied, have and claim the right to the possession of the same where there is no abandonment, is not an interruption to the possession. *De La Vega v. Butler*, 47 Texas, 529. The reason is, the building at least belongs to the claimant. He may use it in any manner he sees fit; and so long as no one enters into possession thereof claiming adversely to him his possession is not interrupted; and possession being once established in Mrs. Towle by the erection of a building on the lot in question, and taking possession of the same, such possession will be presumed to have continued until an interruption therein is proved. *Rayner v. Lee*, 20 Mich., 384. *Clements v. Lampkin*, 34 Ark., 598. This is illustrated by the case of *Haywood v. Thomas*, 17 Neb., 237, where certain lots in the town of Tekamah were inclosed with a fence. In 1870 the fence on the west side was burned down, and afterwards, in 1871, replaced, but the destruction of the fence did not interrupt the running of the statute.

Two witnesses testify that in March or April, 1874, T. O. Wallis informed them that he had purchased the property, and owned it, and that Wallis rented the property to certain parties as his own. Without discussing the question of the admissibility of this hearsay testimony, it is clearly proved, and not denied, that Wallis had been, and then was, the agent of Vogt for the leasing and care of this property, and his possession was, therefore, that of his principal. The rule is well settled that a party will not be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account. *Van Epps v. Van Epps*, 9 Paige, 237. *Blake v. B. C. R. R. Co.*, 56 N. Y., 485. *Michoud v. Girod*, 4 How., 503. *Ringo v. Binns*, 10 Pet., 269. *Krutz v. Fisher*, 8 Kas., 90. *Grumley v.*

Webb, 44 Mo., 444. *Lytle v. Beveridge*, 58 N. Y., 592. *Columbus Co. v. Hurford*, 1 Neb., 146. If an agent, by merely alleging that he was the owner of property intrusted to his care as agent, could divest the title of the owner by whom he was employed to serve, property rights would indeed be held by a slender thread, but such is not the law.

In regard to the deed executed in 1881 by George W. Mumford to the defendant for the lot in question, Mumford testifies as follows: "My brother, Jacob Mumford, sent me out the deed in question, and a letter with it, stating that the old conveyance was so imperfect that he wished my signature for the purpose of correcting it. I only received one letter concerning this matter, that being from my brother, Jacob Mumford, which was just prior to the execution of the deed. I did not receive any consideration for the conveyance whatever." This is not denied, and as the defendant had not had a deed from Mumford before this time, it will not be contended that his equities in the case are very strong. As the plaintiff and those from whom she derives title to the premises were in actual, open, notorious, and continuous possession of the same for more than ten years before the 16th day of November, 1877, when the defendant took possession, the statute of limitations has run in her favor, and she has a valid title to the property by adverse possession. The judgment of the district court is reversed, and judgment will be entered in this court in favor of the plaintiff. The parties may agree, if they can, upon the amount due the defendant for taxes paid by him on the property, and the interest thereon, and also the amount due from him for four years before the commencement of this action, for the use and occupation of the premises. In case they are unable to agree, the court will appoint a referee to compute the same and strike a balance. One-half of Mr. Griggs', the referee, allowance is to be paid by each party.

JUDGMENT ACCORDINGLY.

THE other judges concur.

HERMINE LEPIN, APPELLANT, v. C. N. PAINE & Co. ET
AL., APPELLEES.

18	629
24	870
18	629
43	888

Mechanic's Lien: APPEAL: EQUITY JURISDICTION. One S. brought an action to foreclose a mechanic's lien against L. & L. the owner of the fee, P. & Co., material men, being made parties. P. & Co. answered setting up the amount due to them, and claiming a lien. The court found in favor of S. and against P. & Co., and rendered a decree accordingly. P. & Co. appealed, and on the hearing their claim was held to be valid, and the cause was remanded to the court below to enter judgment in conformity to the opinion. *Held*, 1st, That as the interests of the parties were inseparably connected the appeal brought up the entire case, and the court must enter a new decree; 2d, That the court should adjust the equities between S. and L. & L., and if necessary take additional evidence for that purpose.

REHEARING of case reported in 15 Neb., 326.

Brown & Ryan Brothers, for appellant.

Batty & Ragan, for appellees Paine & Co.

Dikworth & Smith, for appellee Scales.

MAXWELL, J.

This case was before this court in 1882, and is reported in 13 Neb., 521, and again in 1883, and is reported in 15 Neb., 326. In the case last cited it is said that the Lepins were entitled as against Scales to set off the judgment in favor of Paine & Co. against the judgment recovered by Scales against them. A rehearing was granted, and the cause again submitted.

After the decree, so far as Paine & Co. were concerned, was reversed in 1882, upon the cause being remanded to the district court, a motion was filed on behalf of the plaintiff in error the effect of which would be to set off the judg-

ment in favor of Scales against the amount due Paine & Co. for material. No facts were stated in the motion showing the right of Mrs. Lepin to equitable relief.

Mrs. Lepin also filed a motion asking among other things that she be permitted "to pay into the court the sum of \$690 and interest thereon from the commencement of this action at 7 per cent, and that upon such payment being made within sixty days from date of the order, that the defendant and her property be entirely relieved and discharged of any and all liens and claims, and that such payment shall operate as a discharge of all mechanics' liens now in controversy, and of all decrees entered by this court against the defendant and her property in any and all proceedings taken or had in this case." The motions were overruled in the court below, we think properly.

Scales claims in his petition in the original action that Hermine Lepin and Harmon Lepin became indebted to him in the sum of \$6,098.06 for work and labor performed by him and his servants and employes, and for material furnished in the erection of the hotel in question. A considerable portion of this is for labor performed and material furnished under various modifications of the contract. A number of these changes are admitted and the price to be paid not questioned. The court below seems to have found the very lowest sum possible, under the evidence, in favor of Scales. To what extent this included the claims of Paine & Company involved in this action does not appear. In other words, this court found the claim of Paine & Co. to be a valid claim, and that they were entitled to a mechanic's lien on the property to secure said debt. But there is nothing in the record to show that the court below considered the claim valid or allowed the same in the decree. It is therefore impossible for this court to say that the decree of \$690.00 in favor of Scales included the claim of Paine & Co., which this court has held to be valid. The interests of the parties are inseparably connected in this

State v. Cain.

case, and the appeal took the case up as to all. *McHugh v. Smiley*, 17 Neb., 626. *Glass v. Greathouse*, 20 Ohio, 503. *Hocking Valley Bank v. Walters*, 1 Ohio St., 201. *Emerrick v. Armstrong*, 1 Ohio, 513. *Taylor v. Courtney*, 15 Neb., 196. Max. Pl. & Pr. (4th Ed.), 454, note.

The decree, therefore, being changed in a material part, which affected both Scales and the Lepins, should have been left open so far as they were concerned for the court below to adjust the equities between them, and if necessary for that purpose to hear further evidence in the case. The case must therefore be remanded for that purpose, and the case in 15 Neb., so far as it is in conflict with this opinion, is modified.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE, EX REL. JAMES T. KINZER ET AL., RELATORS,
v. JAMES R. CAIN, TREASURER OF RICHARDSON
COUNTY, RESPONDENT.

Taxes: COLLECTION. It is not the duty of a county treasurer, nor has he the power, under the statutes of this state now in force, to seize or sell personal property for real estate taxes.

ORIGINAL application for mandamus.

E. W. Thomas, A. J. Weaver, and Frank Martin, for relator, cited: *Johnson v. Hahn*, 4 Neb., 143. Blackwell Tax Titles, 172-177. Cooley, 302.

C. Gillespie, for respondent, cited: Comp. Stat., Ch. 77, §§ 89, 138, 139.

Isham Reavis, on same side, cited: *Kittle v. Sherwin*, 11 Neb., 67. Cooley, 34. 2 Desty, 746. *Ham v. Miller*, 20

18	631
35	123
18	631
56	517

Iowa, 450. *Annapolis v. Harwood*, 32 Md., 471. *Shaw v. Pickett*, 25 Vt., 482.

COBB, CH. J.

This is an original application for writ of mandamus to compel the respondent, who is the county treasurer of Richardson county, to levy upon the personal property of certain owners of real estate in said county, and sell the same for the purpose of collecting the real estate taxes due from such owners upon said real estate owned by them respectively.

The respondent appeared and demurred to the relation, thus presenting an issue of law, which may be stated as follows:

Is it the duty of the county treasurer to seize and sell the personal property situated in his county of the owner of real property, also situated in his county, for the purpose of collecting the taxes on such real property which are unpaid and delinquent?

I think we may safely say that it will not be held to be his duty to seize and sell as above, capable of being enforced by mandamus, unless it be found that such duty is enjoined upon him by statute. The duty of paying taxes by the owners of property, as well as the duty and power to collect them by the constituted authorities when their payment is neglected or refused, rests solely in this state upon constitutional and statute law, and in no degree upon the principles or authority of the common law of England. In this connection I yield to the inclination to say, that with the most profound respect for the court as constituted at the date of the judgment in the case of *Johnson v. Hahn*, 4 Neb., 139, and especially for the writer of the opinion in that case, and while it is not my purpose to criticise that case as a fair construction of the statutes then in force, yet, in so far as it invoked the authority of the common law and of general principles, I have failed in my efforts to

bring my mind to its approval. No doubt in England, or from an English standpoint, real or landed property is, and has always been, invested with a quality superior to that of personal property. This is traceable to two causes: *First*, Their insular position and limited territory, rendering it impossible for many outside of the hereditary class of noble and wealthy persons to own land, hence the law of primogeniture and entailment, devised for the purpose of preventing the division of estates and of preserving the lands intact in the family; and *Second*, To the principles of the feudal law, which originally made each holder of landed estate a knight and a gentleman, a quality which did not attach to the owners of chattels alone, however wealthy. Neither these facts, the laws founded upon, nor the principles or prejudices which follow them, have ever prevailed in America; certainly not in Nebraska. Here there has never been any quality of superiority ascribed to one species of property over another. It has been and is the policy of our government and people to favor the free, original distribution of landed property among all who would avail themselves of it. With a continent instead of an island at their disposal, the American governments and people have always favored the free and untrammelled transfer of titles of real estate from man to man. And recognizing the accumulation of large bodies of land in the hands of one owner as a great evil, they have always looked to the taxing power, as well as to the equal distribution of the lands of intestate decedents equally among the heirs, as potent guarantees against its becoming a threatening one.

I think, therefore, that if we are to consider anything besides the letter and true intent and meaning of the statute as controlling the decision of the question in hand, and we find it necessary to guard one species of property more than another from the tax gatherer, we will find the object of our solicitude rather in the useful and necessary articles of personal property, than in his real estate.

The act of 1871 was in force at the date of the decision and opinion above referred to. By the first section of said act it was declared to "be the duty of the county treasurer * * * to proceed, as soon after the first day of May as practicable, to make such delinquent tax out of the personal property of such delinquent, if such property can be found; and this provision shall apply as well to the taxes assessed on real estate, and remaining unpaid, as to delinquent taxes assessed on personal property, and the remedy to be pursued shall be the same as provided in sections forty-nine and fifty-two of said act" (meaning the act of February 15, 1869, to which said act was an amendment), etc. General Statutes, 916. The above provision was passed as an amendment to section 50 of the act of February 15, 1869, and remained in force until the taking effect of the general revenue law of 1879; although my recollection is that it was generally understood to have been superseded by other provisions of statute at an earlier date. But be that as it may, there can be no doubt that the act of February 15, 1869, "and all acts and parts of acts supplemental to and amendatory thereof," including the act of June 6, 1871, were repealed by the act of 1879, which went into force September 1st of that year. Comp. Stat., Ch. 77. It was, no doubt, the intention of the legislature in the latter act to make it perfect and complete in itself, without depending in any degree upon the provisions of the former statutes, at least up to the point of seizing and selling chattels for personalty taxes, and of offering lands for sale for the delinquent taxes remaining unpaid thereon. From a careful examination of the provisions of said act, I am unable to find any authority—certainly no duty—devolving upon a county treasurer to seize and sell personal property for taxes due on real estate; and the careful elimination therefrom of all provisions of former statutes which had been held or supposed to impose such duty or confer such authority must, upon well-known principles of con-

State v. Cain.

struction, be held to indicate the will and intent of the legislature to withhold such authority, and not to impose such duty. While it is made the duty of the county treasurer, under certain and well-defined circumstances, to seize and sell chattels for personalty taxes unpaid and delinquent, quite different, and, as I think, exclusive duties are imposed upon such officer in respect to real estate taxes.

The demurrer to the relation is therefore sustained, and the application dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SAME V. SAME.

Tax Sales: PURCHASE BY COUNTY COMMISSIONERS. At all tax sales, public or private, the county commissioners of the proper county may purchase for the use and benefit of their respective counties any real estate therein which has been offered at public sale for delinquent taxes and remains unsold for the want of other bidders.

ORIGINAL application for mandamus.

E. W. Thomas, A. J. Weaver, and Frank Martin, for relator.

C. Gillespie and Isham Reavis, for respondent.

COBB, CH. J.

This is an application for a peremptory writ of mandamus to be issued to the respondent, who is the county treasurer of Richardson county, commanding him to sell certain lands in said county at private tax sale to the relators, the board of county commissioners of said county.

It is alleged in and by the relation that upon certain real property therein described, from the year 1865 to the year 1880, inclusive, the taxes have not been paid, although the same is owned by a private owner therein named, and though the said real property was regularly and lawfully assessed for each year within said period, and that there now stands on the treasurer's books of said county a large amount therein stated of delinquent taxes regularly and lawfully assessed thereon for the years between the dates aforesaid. And that for each of said years the taxes not being paid on said real property, the same was offered at public sale for said taxes by the county treasurer of said county, as required by law, but not sold for want of bidders, and for each of said years the county treasurer made return of public tax sale and filed the same in the office of the county clerk as provided by law. That on the day of October, 1885, the county commissioners applied to the defendant as treasurer of said county to purchase for the use and benefit and in the name of said county the real property thereinbefore mentioned and described, the same remaining unsold for the want of bidders as aforesaid, and requested said treasurer to issue certificates of purchase of said real property, in the name of said county, but that the said treasurer refused and still refuses to do so, and that again, after the respondent as treasurer had held the public tax sale for the present year (1885) and made his return thereof as provided by law, the board of county commissioners made application to the respondent as county treasurer to purchase said real property for said county, and requested the said treasurer to issue a certificate for the purchase of said real property as provided by law, and that the said treasurer again refused and still refuses so to do, alleging as an excuse therefor that the county cannot purchase at private sale, etc.

To this relation the respondent interposed a general demurrer.

The law granting to the board of county commissioners the power to buy in for taxes in the name of the county such delinquent lands as might remain unsold for want of bidders is one of the remedies devised by the legislature for the great and growing evils of delinquency on the part of tax payers, and is necessary to the enforcement of the remedy by foreclosure of tax liens. As such, the provisions of the law will be liberally construed.

Section 1 of the act approved February 27, 1879, provides as follows: "That at all tax sales provided for by law the county commissioners of the several counties of this state may purchase for the use and benefit and in the name of their respective counties any real estate therein advertised and offered for sale when the same remains unsold for want of other bidders," etc.

Section 109 of the general revenue law of 1879 provides that, "on the first Monday of November in each year, between the hours of nine o'clock A.M. and four o'clock P.M., the treasurer is directed to offer at public sale at the court-house or place of holding court in his county, or at the treasurer's office, all lands on which the taxes levied for state, county, township, village, city, school district, or any other purpose, for the previous year still remain unpaid, and he may adjourn the sale from day to day until the lands and lots have all been offered," etc. Section 113 provides that, "After the tax sales shall have closed, and after the treasurer shall have made his return thereof to the county clerk as provided in the preceding section, if any real estate remains unsold for the want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale at his office to any person who will pay the amount of the taxes, penalty, and costs thereof for the same," etc. Comp. Stat., Ch. 77. Here are two tax sales provided for by law, one public the other private, and these the law-makers doubtless had in view when they provided that "at all tax sales," etc., the county commis-

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sioners may purchase, etc. It was not the purpose of the legislature nor is it within the policy of the laws to permit the county commissioners to enter into competition with private purchasers, but only to purchase such as remains unsold for want of other, that is to say private, bidders or purchasers. But in order to give effect to the language of the statute it must be held that they may purchase at the public sale, yet at that sale they must wait until the private bidders have had an opportunity to purchase and the lands remain unsold for want of other bidders. So also at the private sale, while it is not required that the treasurer wait for the appearance of other or private bidders, yet if they do appear before the sale is made to the county commissioners they will be entitled to the preference. But in the absence of such private purchasers the county commissioners may purchase for the use and benefit of their respective counties, at private sale, any such delinquent real estate as remains unsold for the want of other bidders.

The demurrer to the relation is therefore overruled, and a peremptory mandamus will be issued as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	638
20	636
21	860

18	638
31	790
32	394

18	638
35	691
35	698

18	638
37	43

18	638
46	157

18	638
48	307

18	638
51	257

52	675
53	262

55	234
18	638
61	884

UNION PACIFIC RAILWAY, PLAINTIFF IN ERROR, v. LYULPH OGILVY, DEFENDANT IN ERROR.

1. Appeal from County Court: AMENDMENT OF PETITION.

Where an action was brought in the county court to recover \$990, and on appeal to the district court the petition was amended to claim \$1,380, and judgment rendered for that sum, *Held*, That the petition could not be amended to claim more than \$1,000, and accrued interest, being the limit of the civil jurisdiction of the county court.

2. Instructions must be applicable to the testimony, and must be restricted to the actual questions at issue.
3. An Instruction upon a material point which is not based upon evidence, tends to obscure the real issue, and is erroneous.

ERROR to the district court for Lincoln county. Tried below before HAMER, J.

A. J. Poppleton and *J. S. Shropshire*, for plaintiff in error.

Neville & Heist, for defendant in error.

MAXWELL, J.

This action was brought in the county court of Lincoln county by the defendant in error against the plaintiff to recover the sum of \$990.00 damages, for injury to and killing twelve head of horses and mules by a train of the plaintiff. An appeal was taken to the district court from the judgment of the county court, and the plaintiff below thereupon amended his petition claiming damages therein in the sum of \$1,380. The answer of the railroad company consists of certain denials of the facts stated in the petition, and an allegation of contributory negligence on the part of the plaintiff below. On the trial of the cause the jury returned a verdict for \$1,380.00, upon which judgment was rendered.

The first objection of the plaintiff in error is to the amendment of the petition beyond the jurisdiction of the county court, which is limited in civil actions to sums not to exceed \$1,000. The rule is well settled that if the court in which the action is brought has no jurisdiction of the subject matter, the appellate court will acquire none by the appeal. *Brondberg v. Babbott*, 14 Neb., 517. *Cooban v. Bryant*, 36 Wis., 605. *Stringham v. Board of Supervisors*, 24 Id., 594. *Felt v. Felt*, 19 Id., 208.

Malone v. Clark, 2 Hill, 657. *Stephens v. Boswell*, 2 J. J. Marsh, 29. And this, too, even if the appellate court would have jurisdiction of the subject matter had the action been commenced there. The reason is, an appeal is a mere continuation of the original case, a proceeding in the action. *Aulanier v. Governor*, 1 Texas, 653. *Hough v. Leonard*, 12 Ill., 456. *Hatch v. Allen*, 27 Me., 85. The want of jurisdiction of the subject matter in the court where the action was brought continues in every court to which the action may be appealed, for the reason that it is the same action, and an appeal is authorized only where the court from which the appeal is taken, in case of the failure to appeal, would have authority to enforce its judgment. It will not be claimed that the county court of Lincoln county could render judgment for more than \$1,000. That is the limit of its jurisdiction. Comp. Stat., Chap. 20. The plaintiff below, in bringing his action in that court, well knew that in no event could he recover a greater sum. This was the limit of the power of the court. When appealed, therefore, it is the same case, and to be tried upon substantially the same issues as in the county court. If this were not so all actions might be brought in the county court or before a justice of the peace, and upon appeal to the district court the real cause be stated and tried.

To call such a proceeding an appeal would be an incorrect use of language, and the proceeding itself the abuse of a right. We hold, therefore, that the power of amendment of the appellate court is limited to the highest sum which the court from which the appeal was taken was authorized to render judgment, and accrued interest.

2. The testimony shows that on the morning of the 11th of March, 1884, one Louis Bryant left North Platte with about 60 head of mules and ponies belonging to the defendant in error, intending to drive them to an irrigating ditch then being constructed at or near O'Fallons.

The public road on which he was driving these animals for several miles west of North Platte runs north of and nearly parallel with the Union Pacific Railway. From four to six miles west of North Platte—the exact distance does not appear, a stream of water (called a slough in the testimony) crosses the railway and public road. There was no bridge over this stream on the line of the public road, and on the morning in question the stream was covered with ice, the character of which does not appear. The stream crosses the railway a few rods west of the point where it crosses the public road, and there was also a ditch 2½ feet wide, filled with water, between the public road and the railway. The stream or slough at the point where the public road crosses it is forty-two feet in width. This stream, the map introduced in evidence shows, flowed north of and nearly parallel to the public road for some distance east of the point of crossing. Bryant seems to have had no trouble in driving the animals in question, but when near the point of crossing,—the exact distance does not appear,—on looking back he saw a freight train going west on the railroad at a speed of fifteen to eighteen miles per hour, the train being less than half a mile away. To this point there is no material conflict in the testimony. In regard to what was done by Bryant upon seeing the train there is a conflict. Bryant testifies that the mules refused to cross the ice and the drove split in two, part going upon the railroad track, and that he followed and got ahead of them to drive them off, but that he was unable to do so because of the approach of the train. Mr. Brown, the fireman on the engine, testifies :

“We were about a mile from the mules when we first saw them ; Mr. Crusen, the engineer, asked me what they were, I told him I thought they were mules that belonged to the ditch company ; as soon as the man that was with them saw us he started up on the outside of them and rushed across the track just ahead of the engine.”

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Q. Did you see him rush up on to them with his whip?

A. I saw him ride up on the outside of the herd and whip his horse up.

Q. Did the head end of the train of mules start for the track before he commenced whipping them up?

A. No, sir, it was after.

Q. About how far behind the mules was the engine when he commenced to whip them up?

A. I could not say; I should judge about fifty yards.

Q. You saw them as they started for the track?

A. Yes, sir.

In this he is substantially corroborated by the engineer. When the mules and ponies reached the track the testimony shows that the engine was but a few yards from them. The engineer then reversed his engine, put on a full head of steam, and sand on the track, and brought the train to a stop a few rods beyond where the injury occurred. There is considerable testimony in the record tending to show that Bryant was intoxicated at the time the injury occurred. Upon this and other testimony of like nature the court instructed the jury as follows:

“That the plaintiff, by his employe, was driving the mules and ponies near the railroad track cannot of itself be regarded as negligence or carelessness for which he was in any degree responsible. It was his right to drive along the highway or to let his mules and ponies run at large near the defendant's railway track, and if any of the animals so driven accidentally strayed upon the track, because it was not fenced, and without fault of the plaintiff in driving them there, were killed, then the defendant company is liable; but if the plaintiff, by his employe, drove the animals upon the track in front of an approaching train, either carelessly, negligently, or willfully, and the train ran upon them and injured or killed them or any of them, in spite of the efforts of the engineer and others in charge to clear the track and stop the train, then the company is not

liable. In other words, if the injury and death of the stock was owing to the plaintiff driving it on the highway near the track, and the stock then going upon the track because it was not fenced, the death and injury would seem to be the direct result of the company neglecting to fence its track, and it is proper the company should pay for the consequences of such negligence, but if the plaintiff was driving the stock near the railroad, and a train was approaching, and plaintiff negligently, carelessly, or willfully drove the stock on the track, and it was then run over and injured and killed, the injury and death would seem to be not the immediate result of the company neglecting to fence, but the immediate result of plaintiff driving it upon the track."

It will be observed that the jury were told that it was the right of the plaintiff "to let his mules and ponies run at large near the defendant's railway tracks." This would have been proper if there had been testimony tending to show that the animals mentioned were running at large, but there was none. The object of instructions is to enable the jury to apply the law to the testimony in the case, and so determine the rights of the parties. The law, as stated by the court in the instructions, must be applicable to the testimony, or it can scarcely fail to mislead the jury; and particularly is there great danger of this in cases where the right to recover depends upon the conduct of one or both of the parties. Where an instruction is given which assumes the existence of certain facts not in evidence, the effect usually is to convince the jury that in the opinion of the judge there is testimony upon the points named, hence the real issue is obscured or lost sight of, and an erroneous verdict is the result. In a number of cases this court has held that it was error to give an instruction where there was no evidence to base it upon. *Holmes v. Boydston*, 1 Neb., 346. *Walrath v. State*, 8 Id., 91. *Smith v. Evans*, 13 Id., 316. *Steele v. Russell*, 5 Id., 216. As there was no evidence upon the point named, the instruction in ques-

State v. Palmer.

tion was erroneous, and evidently prejudicial to the plaintiff in error. There were other instructions given and refused, to which it is unnecessary to refer. We adhere to the former decisions of this court as to the liability of a railway company, under the statute (Comp. Stat., Ch. 72), in case of a failure to fence its track; but that question, on the testimony in the record, is not involved in this case, and, in any event, each party is entitled to a fair submission of the case to the jury. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

18	644
25	407
18	644
35	401
18	644
54	172
55	717

STATE, EX REL. BARTHOLOMEW DONAVAN, v. THOMAS
PALMER ET AL., SCHOOL BOARD DISTRICT No. 7,
COLFAX COUNTY.

1. **Schools: ATTACHING PARTS OF TERRITORY TO DISTRICT.**
Where, on petition of the parent to the county superintendent, stating that it is impracticable, on account of streams of water, for his children to attend school in the school district in which he is situated, the superintendent has authority, and it is his duty if he finds the statements true, to attach to an adjoining district so much territory as may be necessary to give such children school privileges.
2. —: **JURISDICTION OF COUNTY SUPERINTENDENT.** An order of the county superintendent as to the formation, division or change of school districts where he has jurisdiction cannot be attacked in a collateral proceeding.

ORIGINAL application for mandamus.

M. B. Hoxie, for relator.

C. J. Phelps, for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the defendants to permit the children of the relator to attend the public school in district No. 7 of Colfax county, of which the defendants are officers. The relator served notice on the defendants, as required by the rules, and the defendants appeared by attorney and contested the right of the relator to the relief sought.

The relator alleges in his petition that he "is the head of a family, and is now, and was at the times hereinafter mentioned, the father of seven children of school age, to-wit: John W., eighteen years old; Clarabel, fifteen years old; Charles L., thirteen years old; Anna, ten years old; Addie, eight years old; James B., seven years old; and Sophronia, over five years old, all of said children at said times, and now are, living at home with the plaintiff, and under his care and custody.

4. That plaintiff was a resident and tax payer of school district number nine of said Colfax county prior to September 12, 1885.

5. That plaintiff is a farmer, and has been for several years last past, and owns the farm and lands herein mentioned; that prior to the last mentioned date, Sept. 12, 1885, 160 acres of his farm were in said district number seven, and part—to-wit, the south half of the north-east quarter, and the north-west quarter of the south-east quarter of section sixteen in township eighteen north, of range four east of the 6th principal meridian—was in said district number nine; that his residence is on the lands last described, and was situated about four rods from the imaginary line dividing said districts. That his said house was, and is, nearly four miles from the school-house in said district nine; that at times, in wet seasons, it was, and is, impracticable for his said children to attend school in said district nine, there being six streams and branches of

streams, subject to overflow at times, to cross in going from his house to said district school-house; that his said residence was, and is, about two miles and a half from the school-house in said district seven, with no streams or low places to cross.

6. That upon the proper showing made by plaintiff, W. T. Howard, the superintendent of public instruction for said Colfax county, did, on the 12th day of September, 1885, detach the said south half of the north-east quarter, and the north-west quarter of the south-east quarter of said section sixteen from said district nine, and attach the same to and made it a part of said district seven.

7. That after the said action taken by the said county superintendent, the said defendants, with three other residents, tax payers of said district number seven, presented their protest to said superintendent protesting against his said action in attaching plaintiff to said district seven.

8. That the said superintendent thereupon appointed a day, to-wit, the 5th day of October, 1885, at one o'clock P. M. of said day, for a hearing of all the parties interested in said matter, at which time the parties appeared in person and by counsel; that the said superintendent heard all the evidence offered by the parties, the argument of counsel, and after visiting the residence of plaintiff and the said district, and making personal examination, found that it was impracticable for plaintiff to send his said children to the school in district number nine, and made an order allowing his said order of September 12th, 1885, to stand, and the said south half of the north-east quarter and the north-west quarter of the south-east quarter of section sixteen, township eighteen north, of range four east of the 6th principal meridian, to be and remain a part of said district number seven.

9. That by reason of such action this plaintiff is now, and has been, a resident tax payer in and of said district number seven since the said 12th day of September, and

his said children living with him and are entitled to all the rights and privileges of school in said district.

Then follows an allegation that the defendants refuse to permit the relator's children to attend school. The justification of the defendants is an order made by themselves as the school board of said district 7, wherein "it was ordered that the children of Barth. Donavan be excluded from attendance of the school, it being believed, upon counsel had, the said Donavan is not within the lawful bounds of our school district." There is also a copy of the order of the county superintendent, as follows:

"SCHUYLER, NEB., Sept. 12th 1885.

"Barth. Donavan having this day certified before me that Dry Creek, a branch of Maple Creek, renders it impracticable during wet seasons of the year for his children to attend school in their own district (No. 9 of Colfax Co.), therefore, according to section 4, subdivision 1 of school law, I have detached the S. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. 16, and N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 16 of said district, and joined the same to district No. 7 of Colfax county."

The defendants in their answer admit that this order was made, but allege that it was obtained by fraud, and they seek to put in issue in this proceeding errors in granting the order. The provision of the statute under which the order was made is as follows:

"*Sixth.* No new district shall be formed containing less than four sections of land, nor shall any district be reduced by subdivisions or otherwise so as to contain less than that amount, unless the district so formed, or the part of the district remaining after division, shall have an assessed valuation of property of not less than twelve thousand dollars. No district shall be formed extending more than six miles in one direction on section lines; *Provided*, That when streams of water or water-courses make it impracticable to form districts containing four sections,

then the county superintendent may form districts with less than four sections without regard to valuation. Where streams of water make it impracticable for children to attend school in their own district, the county superintendent shall have authority, and it shall be his duty when requested by the parents of such children, to attach to adjoining districts such territory as *he* may deem necessary for the purpose of giving said children school privileges." Comp. Stat., Chap. 79, Subdv. I., § 4.

The statute clothes the county superintendent with power, when certain conditions are complied with, to form new districts, and, when necessary, to make changes in those already existing. Where streams of water render it impracticable for children to attend school in their own district, he is not only authorized, but required, on the application of the parents of such children, and the truth of the statement being established, to attach to an adjoining district such territory as he may deem necessary to give such children school privileges. The policy of our law is to have every child in the state between the ages of five and twenty-one years attend school. For this purpose every organized county in the state, where the number of settlers will justify it, is divided into school districts, which are to a large extent supported by the school fund of the state. And to secure efficiency in the system, the school districts and schools of each county are placed under the general supervision of a county superintendent. He is invested with power, upon proper petitions being filed in his office, to create, divide, or change a school district or districts, and if he acts within the scope of his authority his orders are not subject to collateral attack. No doubt such an order is final within the provisions of section 580 of the Code, and subject to review.

The county superintendent may reasonably be supposed to be familiar with the topography of the several school districts in his county, and the consequent necessity for a

Nessler v. Neher.

change, if one is desired. Hence the statute has conferred original authority upon him; and his orders, where he has jurisdiction, are final until modified, vacated, or set aside in a proper proceeding. This is decisive of this case. A peremptory writ must be awarded as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LOUIS D. NESSLER, APPELLEE, v. M. NEHER ET AL.,
APPELLANTS.

Judgment: LIEN. A judgment in the district court is not a lien upon an equitable interest in real estate of the debtor.

APPEAL from the district court of Saline county. Heard below before POUND, J., sitting for MORRIS, J.

Ryan Brothers, for appellant.

Abbott & Abbott, for appellees.

MAXWELL, J.

An opinion was filed in this case in 1885, which is reported in volume 23, page 245 of the N. W. Rep.* A rehearing was afterwards granted, and the cause again submitted.

The only question involved is, does a judgment lien attach to an equitable interest of the debtor in real estate?

In *Rosenfield v. Chada*, 12 Neb., 25, it was held that an equitable interest in real estate, coupled with actual possession, could be sold under an ordinary execution. That,

* This opinion withheld from publication in regular series of reports by direction of its writer.—REP.

18	649
25	739
18	649
33	754
12	649
40	758
18	649
43	79
18	649
49	802
54	387
18	649
57	424

however, referred to a case where an execution could be levied on such equitable interest, coupled with possession. The question now presented is entirely different.

Sec. 477 of the Code provides that, "the lands and tenements of the debtor, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgment by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."

Sec. 561 provides that, "In all cases in which judgment shall be rendered by a justice of the peace, the party in whose favor the judgment shall be rendered may file a transcript of such judgment in the office of the clerk of the district court of the county in which the judgment was rendered, and thereupon the clerk shall, on the day on which the same shall be filed, enter the case on the execution docket, together with the amount of the judgment and the time of filing the transcript.

Sec. 562 provides that, "such judgment if the transcript shall be filed in term time shall have a lien on the real estate of the judgment debtor from the day of the filing; if filed in vacation as against the judgment debtor, said judgment shall have a lien from the day of the filing, and as against subsequent judgment creditors, from the first day of next succeeding term, in the same manner and to the same extent as if the judgment had been rendered in the district court."

Blackstone defines the words "land and tenement" as follows: "*Land* comprehends all things of a permanent and substantial nature, being a word of very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet in

its original, proper, and legal sense it signifies everything that may be *holden*, provided it be of a permanent nature, whether it be of a substantial and sensible or of an unsubstantial ideal kind." "Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements." The word "tenements," when applied to property on which a judgment lien will attach, is evidently used only in the common acceptance of the word, viz., houses and other buildings.

In *Lawrence v. Belger*, 31 O. S., 180, the statutes of Ohio being similar to our own, it is said: "While we admit that they do not embrace mere equities in lands or tenements, it is difficult to perceive why they should not include remainders vested under legal titles as well as legal estates in lands and tenements in possession of the debtor."

In *Bogart v. Perry*, 1 Johns. Ch., 52, it was held that a judgment at law was not a lien upon a mere equitable interest in land. To the same effect are *Jackson v. Chapin*, 5 Cowen, 485. *Ellsworth v. Cuyler*, 9 Paige, 418. *Roddy v. Elam*, 12 Rich. Eq., 343. *Powell v. Knox*, 16 Ala., 364. *Gentry v. Allison*, 20 Ind., 481. *Jeffers v. Sherbrom*, 21 Ind., 112. *Davis v. Cumberland*, 6 Ind., 380. *M. & St. L. R. R. Co. v. Wilson*, 25 Minn., 382. *Van Cleve v. Groves*, 4 N. J. Eq., 330. This, we think, is a correct construction of our statute. We therefore hold that a judgment is not a lien upon an equitable interest in real estate. The judgment of the district court declaring such liens to bind the real estate in question is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE W. HOMAN, PLAINTIFF IN ERROR, V. STEELE,
JOHNSON & Co., DEFENDANTS IN ERROR.

1. **Consideration: PROMISE FOR A PROMISE.** Where several promise to contribute to a common object desired by all, the promise of each is a good consideration for the promise of the others, and can be enforced by suit when the corporation or person to whom the subscription runs has incurred obligations on the faith of such subscriptions, and has complied with the conditions on which they were made.
2. **Contract: TIME.** Where a time is fixed in which certain work is to be done, it is not, in general, so far of the substance of the contract that if the work is done, but not until some days later, no compensation can be recovered. In such case an action for the price will be sustained, leaving the defendant to show any injury he may have sustained by the delay.
3. ———: **PRACTICE: AMENDMENT IN SUPREME COURT.** Where an action is brought upon a contract instead of a *quantum meruit*, and all the proof introduced without objection, showing the right of the plaintiff to recover, the supreme court will, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for such amendment.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

G. W. Ambrose, for plaintiff in error.

George B. Lake, for defendant in error.

MAXWELL, J.

The action is based on a subscription, of which the following is a copy:

“OMAHA, NEBRASKA, March 17th, 1880.

“We, the undersigned, agree to pay to Messrs. Steele, Johnson & Co., of Omaha, Neb., the sum set opposite our respective names, upon the completion and occupancy by

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them, as wholesale grocers, of a three-story brick building, 66 feet by 120 in size, on lot 4, block 150, in Omaha, Douglas county, Nebraska; said building to be completed and occupied by them on or before the first day of November, 1880; said building to have an outside appearance equal to the Burlington & Missouri R. R. building on the corner of Farnam and 10th streets, Omaha, Neb.

J. Strickler.....	\$100.00
G. W. Homan.....	200.00
J. S. McCormick.....	250.00
Elnathan Mills.....	75.00
Geo. B. Lake.....	75.00
Geo. W. Doane.....	75.00
First National Bank, by H. W. Yates.....	50.00
W. W. Lowe.....	50.00
C. C. Housel.....	50.00 ²²

The plaintiffs below (defendants in error) allege in their petition, in substance, that on the 17th of March, 1880, they were wholesale grocers in Omaha, and that the defendant below was the owner of certain real estate situate near lot 4, block 150, in said city; that said plaintiffs were about to erect a large and expensive building, but had not then decided on a location; that the defendant, on that day, in order to induce the plaintiffs to locate said building on lot 4, block 150, and in consideration of like agreements of and subscriptions of other parties, also lot owners or interested in real estate in said city, subscribed and promised to pay the plaintiffs the sum of \$200 for that purpose, and that, relying upon said subscriptions, the plaintiffs located and erected said building on said lot, and have duly performed all the conditions of said contract on their part to be performed; and that after said building was completed and occupied by the plaintiffs they demanded payment of said sum, which was refused.

The answer of the defendant below admits the partner-

ship of the plaintiffs; that the defendant was interested in certain real estate near lot 4, block 150; admits that defendant signed the contract sued on, and denies all other allegations of the petition. On the trial of the cause the court directed the jury to return a verdict for the plaintiff, which was done, and judgment rendered on the verdict for the sum of \$248.50. In the motion for a new trial the following points were made:

1st. That the verdict is not sustained by sufficient evidence.

2d. That the verdict is contrary to law.

3d. That the court erred in refusing to give the instructions asked by the defendant.

4th. That the court erred in instructing the jury to find for the plaintiffs.

In the briefs of the plaintiff in error no mention is made of error, either in giving or refusing instructions. That ground, therefore, may be considered as abandoned. The only question, therefore, to be considered is, whether or not the evidence sustains the verdict. There is no conflict in the testimony, and it shows the following facts: That in the spring of 1880 the plaintiffs below were looking for a location; that they had three in view, viz., lot 4, block 150, a lot on the corner of 10th and Harney streets, and one on the corner of 9th and Farnam streets; that the price asked for lot 4, block 150, was \$8,000. The lot, it seems, was owned by parties in New York, and as Mr. Johnson was going thereon business, he seems to have been authorized by his firm to purchase it, at not to exceed \$6,500. The testimony of a member of the firm upon that point is as follows: "I think we made an offer first of six thousand dollars. Mr. Johnson went to New York on business, and expected to see the administrator of the estate while there. It was understood between him and his partners that we were to go as high as \$6,500. We thought that was the full value of the property; and if we failed to get that, we had those

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other two pieces in view that we were negotiating for." The subscription paper upon which this action is brought was thereupon prepared by property owners, including the defendant, and signed by them; that the defendant had a livery stable immediately across the alley south of said building, and also other real estate near that point; that the plaintiffs below actually paid \$7,700, and paid certain taxes for the lot, in all more than \$8,000; that they erected a building thereon 66 by 128 feet, and three stories high above the basement. It is admitted that the size and appearance of the building are all that are required by the subscription paper. The testimony also shows that in October, 1880, the plaintiffs stored a quantity of canned goods and raisins in the building, and that from that time until the 15th of December, 1880, they stored more or less goods there, and sold some from that building, but that they did not complete the removal of the stock, and move their office there, until December 15, 1880.

It is claimed on behalf of the plaintiff in error that there is no mutuality in the contract, and certain cases are cited to sustain the position, which will be noticed in their order. *First, Turnpike Co. v. Collins*, 8 Mass., 292. In that case a recovery was defeated upon the sole ground that the promisee, the corporation, had neither accepted nor authorized the subscription.

In *Academy v. Davis*, 11 Mass., 114, the action failed on the grounds, 1st, That the action should have been brought by the trustees and not the corporation; and 2d, That as there was no corporation in existence when the promise was made there was no promisee.

In *Academy v. Gilbert*, 2 Pick., 579, nothing had been done by the promisee on the faith of the promise, and in *Trustees of Hamilton College v. Stewart*, 1 Comst., 581, the plaintiff failed because there was "no engagement whatever upon the part of the plaintiffs or any other person to do or forbear to do anything as a consideration for

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the promise of the defendant." That is, it was a promise to make a gift, which not being performed, no action would lie thereon. In this case, however, the allegations of the petition are, and the proof shows, that in consequence of the promise of the defendant and others the plaintiffs were induced to purchase the lot in question and erect the building thereon. They acted upon the faith of these subscriptions, and that is a sufficient consideration. In 2 Kent Com., *465, it is said: "A valuable consideration is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of a right will be sufficient to sustain the promise." That is, a benefit or advantage accruing to the party who makes the promise or some inconvenience or injury sustained by the party to whom the promise is made is sufficient to support a contract. *Powell v. Brown*, 3 Johns., 100. *Carr v. Card*, 34 Mo., 513. *Clark v. Sigourney*, 17 Conn., 511. *Lawrence v. Fox*, 20 N. Y., 268. *Odineal v. Barry*, 24 Miss., 9. *Warren v. Whitney*, 24 Me., 561. *Doyle v. Knapp*, 4 Ill., 334. Many other cases to the same effect might be cited.

In *Commissioners v. Perry*, 5 Ohio, 57, the contract was as follows:

"We, the undersigned subscribers, do hereby promise to pay the commissioners of the canal fund of the state of Ohio, for the use of said fund, the sums severally annexed to our names, in three several equal installments, the first on January 1, A.D. 1827; the second on January 1, A.D. 1828, and the third and last on January 1, A.D. 1829, upon condition that the canal be located on the east side of the Cuyahoga river from the lower rapids to the village of Cleveland.

"*Cleveland, December 6, 1825.*"

The contract was held to be valid. In that case the legislature had authorized the commissioners to receive

such proposals, but the decision seems to be based on the general rule.

In *Fremont Bridge Co. v. Fuhrman*, 8 Neb., 99, it was held that where a corporation or person to whom a subscription runs has incurred obligations on the faith of such subscription, and has complied with the condition on which it was made, the same may be enforced by suit. It is said (page 103): "While there is some conflict in the authorities, the clear weight of authority seems to sustain the rule that where several promise to contribute to a common object desired by all, the promise of each is a good consideration for the promise of the others and can be enforced by suit when the corporation or person to whom the subscription runs has incurred obligations on the faith of such subscriptions, and has complied with the conditions upon which they were made." In that case the location of the bridge was changed after the subscription was made without the assent of Fuhrman, therefore the court held that he was not liable.

But it is said that the building was not completed and occupied November 1st, 1880, and therefore the defendant below is not liable. An examination of the contract shows that the sums were to be paid on "the completion and occupation of the building." In the next sentence it is stated that the building is to be completed and occupied on or before November 1st, 1880. The rule in regard to time appears to be this: That where there is nothing special in the nature of the property or of the purposes for which it was intended, although a particular day may be fixed for the completion of the contract, yet the general object being the accomplishment of the purpose for which the promise was made, viz., the completion of the contract, the particular day named is merely formal.

A different rule obtains where the nature of the property or the purpose for which it was intended is of such a character as to make time material. In this case the ob-

ject of the subscribers was to benefit their property by inducing a large wholesale firm to establish its business on Harney street and thus induce others to erect business houses thereon and make it a business street, thereby greatly enhancing the value of their property. The building erected was larger than required by the stipulation, and in all respects was fully equal to the requirements of the contract. The benefit so far as it appears was equally as great to the defendant as though the building had been actually completed and occupied on Nov. 1st. And the defendant below when asked for his subscription, in January, 1881, made no objection either to the building or the time of its completion, and promised to pay the amount subscribed. About a month afterwards he made a similar promise, and afterwards sent a friend to try and induce the plaintiffs to take \$100 in satisfaction of the demand. The plea as to time evidently is an after-thought.

3d. It is claimed that the action should have been to recover on a *quantum meruit* and not upon the contract, that when the suit is upon the contract alleging compliance therewith everything is essential in the contract to authorize a recovery. Parsons states the rule in such cases as follows: "If the time be set in which certain work is to be done it is not in general so far of the substance of the contract that if the work be done, but not until some days later, no compensation will be recovered; but an action for the price will be sustained leaving the defendant to show any injury he has sustained by the delay, and use it in reduction of damages by way of set-off;" etc. 2 Parsons on Contracts (5 Ed.), 660. This, we think, states the law correctly. The few days which elapsed after the time fixed for the completion and occupation of the building and the time in which it was actually completed and occupied do not in our view affect the right to recover. The defendants' attorneys in their brief virtually admit this, but say the action should not have been upon the contract. This

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objection should have been made on the trial to be available here. Where proof has been introduced without objection which would entitle a plaintiff to recover, this court would, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for that purpose.

It is apparent that substantial justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

AUGUST BENZON, PLAINTIFF IN ERROR, V. THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY,
DEFENDANT IN ERROR.

Verdict. Where in an action to recover damages for injury to property, and the cause of the injury is a matter of conjecture, a verdict in favor of the plaintiff will not be set aside at his instance because the verdict is not as large as it probably would have been had the cause of the injury been fully proved.

ERROR to the district court of Douglas county. Heard below before WAKELEY, J.

Congdon, Clarkson & Hunt, for plaintiff in error.

T. M. Marquett and *Charles J. Greene*, for defendant in error.

MAXWELL, J.

This is an action for damages growing out of an alleged trespass upon the plaintiff's real estate. The plaintiff alleges in his petition that at the time the injuries were com-

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mitted he was the lessee and in possession of lots 3 and 4, in block 125, in Omaha, and the owner of an ice-house thereon; that on the 1st day of March, 1882, such ice-house was stored with ice belonging to the plaintiff; that said lots are situated to the east of and at the foot of a high bluff, and the slope of the land from the ice-house is from the west to the east, and the natural flow of water in that direction; "that on or about the 1st day of May, 1882, defendant, its agent, and servants wrongfully, willfully, and injuriously entered upon the east 66 feet of said lots, and hauled, dumped, and deposited thereupon a large quantity of earth, and thus formed a barrier which obstructed the flow of water across said lots, prevented its escape from in and about said ice-house, and caused it to collect, stand about, and flow into said ice-house to the height of several feet, thereby wetting and displacing the ice of plaintiff and injuring his building," in all to his damage in the sum of \$15,000.

The defendant in its answer alleges that it is the owner of the lots upon which the grading was done; that the work was performed to raise the grade of said lots to the established grade of Farnam and Douglas streets; that said grading was properly and skillfully done by competent engineers. It is denied that the plaintiff is the lessee of said lots, or that he had stored therein the amount of ice he claims. There is also an allegation that the injury was caused by his own negligence.

On the trial of the cause the jury returned a verdict in favor of the plaintiff for \$75, interest and costs. The principal objection made in this court is, that the verdict is against the clear weight of evidence. It appears from the evidence that in the spring of 1882 the attorneys for the plaintiff, after being informed by Mr. Holdrege, the superintendent of the defendant, that Mr. Calvert was the proper person to whom to apply, addressed to him the following letter:

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"OMAHA, NEB., April 21st, 1882.

T. E. Calvert, Esq., Chief Eng. B. & M. R. R., Omaha, Neb.:

DEAR SIR—Mr. Aug. Benzon, who owns lots 3 and 4, in blk. 125, lying at S. E. cor. of 8th and Douglas Sts., and who has over 4,000 tons of ice stored there, requests us to write you in reference to putting in a culvert from his ice-house through the adjoining lots which you are now filling. On account of filling your lots water already stands in his house to the depth of six inches, and the first rainfall will work him great damage. A culvert 100 feet long would stretch from his house through your lots to the culvert recently put in by the Con. Tk. L. Co., whose permission he has to effect a juncture with them. To do this would be comparatively inexpensive to you, and save him much threatened damage. We would be pleased to receive a communication from you in reference to the matter at your earliest convenience," etc.

To this communication Mr. Calvert, on April 27, 1882, replied as follows: "Yours of the 21st received during my absence. Hence the delay. We certainly do not intend wantonly to harm the property of Mr. Benzon. But in order to put the property lying east of him in shape for R. R. purposes it must be graded up some 8 feet, which will raise it considerably above base of ice-house, and ground around there can only be kept free from water by a drain. A drain through our property is of no value whatever to us and we should not therefore be asked to put it in. We will, however, gladly give Mr. Benzon every facility for placing it. The claim that ditch dug to let water out from ice-house is, I think, without foundation." The testimony tends to show that the ice-house in question is situate on the bottom lands near the Missouri river, but close to the base of the bluffs; that the land upon which it is built is quite low, and even before the grading complained of, the drainage imperfect; that the building was erected in 1876

and was considered a good building of that class; that during the overflow of the Missouri river in 1881 the water had been several feet in depth around the building for some time, which had the effect of causing the building to lean over to the east, and but for heavy props placed against it then it would have burst; that some of the props had been removed prior to the spring of 1882, and there was danger, even while the grading complained of was being done, that the building would burst on the east side and south end. The insecure condition of the building seems to have induced the plaintiff to bank the earth up against the east side and south end of the building to about the height of six feet. On cross-examination he testifies in answer to the question, "What did you bank this up for with dirt that was there?"

A. It was filled up within ten or fifteen feet of the house on the east side; it was filled up to Douglas street. I threw it against the house to keep the sills from falling out. The ice would not have stayed there three days if I hadn't put dirt against the house to hold it together. I would have lost every pound of ice I had if I hadn't put dirt there. If it had once caved it would have been gone.

This it must be remembered was while the grading complained of was being done. The plaintiff made a drain across the grading of the defendant to the sewer of the Tank Co.; but as the ice-house seems to have been lower than the sewer the drainage was still imperfect. This, however, is not claimed to have been the fault of the defendant. There is a conflict in the testimony as to whether or not this drain across the defendant's grade was kept open, the plaintiff testifying that the employes of the defendant filled it in order to have a passage way for teams, while other witnesses testify that it was not filled up, but remained open during the entire summer of 1882 as well as that of 1883.

During the summer of 1882 the west side of the ice-house burst for a distance of about fifty-five feet from the south-west corner. This caused a considerable loss of ice from melting, which is the principal ground of damage in this case. The testimony, however, fails to show with any degree of certainty that the bursting of the ice-house was caused through the fault of the defendant. The ice is shown to have melted at the south-west corner of the building, and not evenly around the outside courses as it necessarily would have done had it been caused by stagnant water surrounding the building. It is more probable that the injury was caused by defective packing, and the insecure condition of the building. But, however this may be, these questions were submitted to the jury and considered in their verdict, and unless the verdict is clearly wrong it will not be set aside. In the 263 pages of testimony in the record a very large proportion is devoted to the value of ice, the quality, mode of packing, degree of waste, etc., questions proper to be inquired into, but the real cause of action—the cause of the injury—for want of evidence, no doubt, is left almost entirely to conjecture. The case was one proper to be submitted to a jury under proper instructions. Objections are made to some of the instructions, but as we see no error in them they need not be noticed here. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSHUA COX, APPELLEE, V. FRANCIS M. ELLSWORTH
ET AL., APPELLANTS.

1. **Death: PRESUMPTION OF, FROM ABSENCE.** The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which probably resulted in his death. *Tisdale v. Connecticut Mutual Life Ins. Co.*, 26 La., 170.
2. ———: **PRESUMPTION OF, FROM CIRCUMSTANCES.** Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred without regard to the duration of such absence. *Ibid.*

APPEAL from Hamilton county. Tried below before NORVAL, J.

Austin J. Rittenhouse and *William P. Hellings*, for appellants, cited: *Burr v. Sim*, 4 Wharton, 150. *Eagle's Case*, 3 Abbott, 218. *Proctor v. McCall*, 23 Amer. Decisions, 135. *Holmes v. Johnson*, 42 Pa. State, 164. *Miller v. Beates*, 8 Amer. Decisions, 658. Abbott's Trial Evidence, 74.

Alfred W. Agee, for appellee, cited: *Jamison v. Smith*, 17 Rep., 300. *John Hancock v. Moore*, 34 Mich., 41. Best Evidence (Morgan's Ed.), § 409. *Tisdale v. Insurance Co.*, 26 Iowa, 170. *Ryan v. Tudor*, 31 Kan., 366. *Hancock v. Insurance Co.*, 62 Mo., 29.

COBB, CH. J.

This is an action in equity brought in the district court of Hamilton county, by Joshua Cox, plaintiff, against

Francis M. Ellsworth and wife, defendants, to reform an error or mistake in a deed of real estate executed by said defendants to one Mitchel Clement, under whom the plaintiff claims. The alleged error or mistake consisted in a misdescription of the land intended to be described in and conveyed by the deed. The defendants answering denied that there was a mistake or error in the deed, and denied the death of Mitchel Clement, their grantee. The deed under which the plaintiff claims his right in the premises was executed by Sarah J. Clement, widow or wife, and Minnie L. Clement, only child of said Mitchel Clement. This land was purchased and deed received by said plaintiff, and executed by said Sarah J. Clement and Minnie L. Clement on the theory that said Mitchel Clement was deceased prior to the date thereof—November 21, 1881.

The cause was tried to the court, which found all of the issues for the plaintiff, and adjudged, decreed, and ordered the said deed reformed and corrected as prayed by the plaintiff in his petition, etc.

The cause is brought to this court by the defendants by appeal. The case presents two questions:

1. Was there a mistake in the description of the land sought and intended to be conveyed by Francis M. Ellsworth and wife to Mitchel Clement under date June 9, 1875?

2. Was Mitchel Clement deceased prior to November 21, 1881?

The deed as recorded describes the land conveyed as "the south half of the north-west quarter of section 34, in township 10, range 5 W. It was amply proved on the trial that this land was entered under the homestead law prior to any of the transactions between Ellsworth and Clement by one Thomas C. Klumb, who continued to own and occupy it until long after the date of said transactions. The defendant F. M. Ellsworth presented his own deposition, taken in Washington Territory, as evidence on the part of the

defendants. In his deposition he does not claim that he ever owned the land actually described in the deed to Clement; but he does swear that he did *not* intend by the said deed to convey to Clement the south half of the north-west quarter of section 34, in township 11, range 5 W., the only tract of land that he is proved to have owned in Hamilton county at that time. On the other hand, Mr. Agee, a witness on the part of the plaintiff, testified that he was intimately acquainted with the defendant Francis M. Ellsworth in the fall of the year 1874, and for three or four years thereafter; that in the fall of 1875 he had a correspondence with said defendant (defendant residing at Seward, and witness at Aurora, Hamilton county) in reference to this land; that one Hyatt came to witness, who was then a law partner of said Ellsworth, and inquired if Ellsworth would sell the said tract of land, the south half of the north-west quarter of section 34, in township 11, R. 5 W.; that at the request of said Hyatt witness wrote to Ellsworth in regard to said tract of land, whether it was for sale, and the price and terms; that Ellsworth wrote a letter to witness in reply. Said letter having been destroyed at the time of the closing up of the partnership business between witness and defendant, witness was permitted to state the contents of the letter, and testified as follows: "In reply to my letter he wrote me that he did not own the land at all, that he had sold it. I saw Mr. Ellsworth, and we had frequent conversations about it. After he wrote that, I saw Mr. Hyatt, and Mr. Hyatt told me that the record showed it was his, and I went and examined the record, and found that so far as the record showed that the title was still in Ellsworth, and at the first time I saw Ellsworth, I think, at any rate after that time, I spoke to him about it, and told him that the record showed he still owned the land. 'Well,' he said, 'it is a mistake in the record.' He said he had sold the land, and that there was some mistake about it. I think that we went to

the court-house and examined the records in reference to the matter, and took the index and looked through, and we found that the title was still in Ellsworth, and that he had never made any conveyance of it after he received the conveyance from Lewis, and on searching the index we found where a deed from Ellsworth to Clement (I can not say that I now remember what the name was), but I know that we traced out this deed from him to another party, and we found that it appeared of record that the deed covered the south half of the north-west quarter of sec. 34, town. 10, range 5, instead of town. 11, range 5; and Ellsworth said that undoubtedly there had been a mistake made in the deed in recording it, and that he was sure if the party looked up the original they would find it was all right, and it would describe the piece of land as in town. 11, instead of town 10. I had several conversations with Mr. Ellsworth about the matter, and I told Mr. Ellsworth what Mr. Johnson claimed about the matter, and he still insisted that the deed would be found to be all right, and that it must have been a mistake in the record. The last conversation I had with him occurred since he moved out to Washington Territory. He came back here, and that is, I believe, the first time he claimed to still own the tract of land out here in town. 11."

Upon this and other testimony I do not think that the court could have found otherwise than that "there was an error and mistake inadvertently made in the description of the premises intended to be made," etc. Some stress is laid in the deposition of defendant on the assertion made by him that if there was a mistake in the description of the land in the deed it was not his mistake, but the mistake of Mills, the agent of the grantee. I do not think it would make any difference whose mistake it originally was. By executing and acknowledging the deed he adopted its terms, and if there was a mistake in it, though made by the draftsman, whoever he might be, so that the deed did

not express the true intention of the grantor, a court of equity will reform it so as to comply with such intention.

On the second point, it appears from the record that about five years previous to the date of the conveyance by Sarah J. and Minnie H. Clement to the plaintiff, Mitchel Clement was a man of about sixty-three years of age, married, and had been married about 17 years, his family consisting of his wife and an only daughter, a bright and intelligent girl of about fifteen; he being of sober and industrious habits, greatly attached to his family and home, in easy pecuniary circumstances. He resided with his family in his own house in the village of Forrest, Livingston county, Illinois. His business had been for many years that of purchaser of corn. At this time the active season for that business was just about to commence. He had just finished repairing his cribs and putting in new scales for the purpose of weighing corn. Under these circumstances, in the early part of the month of December, after eating his breakfast in the morning, he as usual left his house and went into the village without expressing his intention of going away anywhere, and without taking anything with him but his every-day clothes on his back. He never returned, nor did his family or friends or any of the citizens of Forrest ever see or hear of him so far as is known, except to learn from the bankers, where it seems he had some money on deposit, at the neighboring city or town of Fairbury, about five miles distant, who stated to the wife of the missing man that he came into the banking house on that day and drew out his money which he had on deposit there, amounting to about \$1,800. All of his relatives and connections known to his wife and daughter were corresponded with for news of the missing man, and extensive search made by the people of Forrest for his body in case any accident or casualty had befallen him, but all without effect.

Now then, was this evidence sufficient, after the lapse of

five years, to sustain the finding of the court that Mitchell Clement was dead? By reference to the text-books and cases, it seems to be the settled rule both in England and this country that seven years is the period at which the presumption of continued life ceases. But this period may be shortened by the proof of such facts and circumstances connected with the person whose life is the subject of the enquiry as, when submitted to the test of reason and experience, would force the conviction of death within a shorter period. Under the rule above stated, if any person domiciled in the city of Lincoln leaves the place of his residence on a journey of business, health, or pleasure, or simply disappears and does not return, nor is heard of by any person at said city or elsewhere, so far as is known to the authority making the enquiry, until after the lapse of the period of seven years, the presumption that such person is still in life ceases to exist and he is presumed to be dead, without regard to any fact connected with the circumstances, life, or habits of such person. But when the enquiry arises before the expiration of seven years, and the facts and circumstances of the person are proved to have been such as to compel the thoughtful and experienced mind to believe that, if still living, such absent person would have returned to or communicated with his home, wife, children, relatives, or friends left behind, or to the care and enjoyment of property abandoned, and that he has never returned—in such case, although the period of seven years has not elapsed, the presumption of continued life may be held to have ceased.

The case of *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Ia. R., 170, is a strong case and quite in point to the case at bar. This was an action by Mrs. Tisdale against the life insurance company upon a policy of insurance on the life of Edgar Tisdale, her husband. Of course, the leading fact to be proved by her was the death of Edgar Tisdale. The case does not show the date of the com-

Cox v. Ellsworth.

mencement of the suit, but as the opinion of the supreme court was filed December 12, 1868, it is fair to presume that the suit was commenced in the district court as early as the first of that year. The evidence tended to prove that Edgar Tisdale "was a young man of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends, and the entire affection of his wife, and was living in apparent happiness, with no cause of discontent with his condition which would have influenced him to break the domestic and social ties with which he was so pleasantly bound to life. Visiting Chicago, September 25, 1866, upon business, he was last seen by any acquaintance on the corner of Lake and Clark streets in that city about 3 o'clock of that day. No trace of him was afterwards discovered, though his friends made every effort to find him and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for information that would lead to his discovery either dead or in life. The detective police were employed to search for him, without results. No tidings have been received of him, and not the faintest trace of the cause or manner of his disappearance has been discovered. The district court instructed the jury that "the law presumes the existence of a person, when duly proved, to continue until the contrary is shown by some sufficient proof, or, in the absence of such proof, until a different presumption arises. Such presumption arises in law after the expiration of seven years without any intelligence concerning such person; but upon the issue of the life or death of such person, a jury may find a presumption of death from the lapse of a shorter period than seven years, provided other circumstances concur. These other circumstances must be facts proven or presumed to be true, the existence of which being so established, gives reasonable ground for the presumption of such

death ; such as, for instance, that such person is proven to have sailed on a voyage which should long since have been accomplished, and the vessel in which he sailed has not since been heard from, from which fact the loss of the vessel and those on board will reasonably be presumed ; or that such person is shown to have last been in a house destroyed by fire, or a tornado, at or so near the time of its destruction as to furnish a reasonable presumption that he perished in it. But in the absence of proof of some such circumstances no amount of probabilities arising from continued absence or neglect to write, or from confidence in the character or habits of the person alleged to be dead, or in his previous declaration of intention, will be sufficient to warrant the presumption of death within seven years, because the law fixes that period for a presumption of death to arise from such circumstances." The jury found for the defendant. In the supreme court, Beck, J., in delivering the opinion of the court reversing the judgment of the district court, said : "The first instruction, announcing the rule that the death of an absent person cannot be presumed, except upon evidence of facts showing his exposure to danger, which probably resulted in death before the expiration of seven years from the date of the last intelligence from him ; and that evidence of long absence without communicating with his friends, or character and habits, making the abandonment of home and family improbable, and of want of all motive or cause for such abandonment which can be supposed to influence men to such acts, is not sufficient to raise a presumption of death. The instruction is not in accordance with the true rule of evidence, and is erroneous." * * "Any facts or circumstances relating to the character, habits, condition, affection, attachments, prosperity, and objects in life, which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration

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of such absence. A rule excluding such evidence would ignore the motives which prompt human actions, and forbid inquiry into them, in order to explain the conduct of men," etc.

The above case was cited with approval in *Hancock v. Amer. Life Insur. Co.*, 62 Mo. R., 26; also, by the supreme court of Kansas in *Ryan v. Tudor*, 31 Kan., 366, all cases cited by counsel for appellee.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN C. MORRISSEY ET AL., PLAINTIFFS IN ERROR, V.
ANTON SCHINDLER, DEFENDANT IN ERROR.

1. **Trial:** DISMISSAL OF ACTION AS TO ONE DEFENDANT DURING TRIAL. The action was brought against the appellants and the Burlington & Missouri River Railroad Company in Nebraska as defendants. Pending the trial plaintiff asked and obtained leave of the court to dismiss his case as to the railroad company, with costs; *Held*, No error, and that the trial was properly allowed to proceed as against the remaining defendants, plaintiffs in error, without re-empaneling or reswearing the jury, although the answer of defendants contained a paragraph in the nature of a plea in abatement for the misjoinder of the railroad company as a party defendant.
2. ———: ———: EVIDENCE. The contract set out in the pleading was properly admitted in evidence against the remaining defendants after the dismissal of the cause as against the railroad company, although the said railroad company was not a party to said contract.
3. **Petition Against Partnership.** The defendants, Morrissey Brothers, being described in the petition as "John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers," they were sued as a firm to all intents and purposes.

18	672
36	730
18	672
48	863
18	679
44	643
18	672
645	710

Morrissey v. Schindler.

4. **Contract: PAROL EVIDENCE OF MODIFICATION.** It is competent to prove by parol a change or modification in the terms of a written contract made by the parties to such contract at a time subsequent to the execution thereof. And the consideration for the contract may be a sufficient consideration for such change or modification.
5. **Work and Labor: EVIDENCE IN CASE STATED.** Under the peculiar facts and circumstances of the case at bar; *Held*, That the evidence which tended to prove plaintiff's claim for extra compensation for performing the work set out in the petition tended also to disprove and controvert defendants' counterclaim for damages alleged to have been sustained by them by reason of said work not having been performed in accordance with the terms of the original contract.
6. **Action for Work and Labor: VERDICT SUSTAINED.** Action brought by defendant in error against "John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers, and the Burlington and Missouri River Railroad Company in Nebraska," for labor and mechanical skill in the erection of certain elevator buildings under a certain written contract, and for certain extras and expenses claimed under an alleged modification of the terms of said contract. The verdict, as follows:

"Anton Schindler,	}	In district court Nebraska. Verdict for plaintiff.
vs.		
Morrissey Brothers, et al.		

"We, the jury duly empaneled and sworn in the above entitled cause and to try the issues joined therein, do find for the plaintiff, and assess his damages at the sum of three hundred and fifty dollars."

[Signed by the foreman.]

Sustained both as to form and substance.

ERROR to the district court for Cass county. Tried below before POUND, J.

Crites & Ramsey, for plaintiff in error, cited: 1 Tidd's Pr., 641. *Myers v. Erwin*, 20 Ohio, 382. *Alling v. Sheldon*, 16 Conn., 436. *Sweet v. Tuttle*, 14 N. Y., 465. *Manahan v. Gibbons*, 19 Johns., 427. *Detroit v. Houghton*, 42 Mich., 459. *Williams v. State*, 6 Neb., 334. *Miller v. Jewell*, 5 Pac. Rep., 652. *Slearns v. Barnet*, 2 Mason, 173. *Ross v. Austill*, 2 Cal., 183.

M. A. Hartigan, for defendants in error, cited: Puterbaugh's Practice, 144. 2 Broom & Hadley's Blackstone, 253. 4 Kan., 37. 9 Id., 104. 15 Id., 495. 33 Mich., 243. 34 Id., 4.

COBB, CH. J.

This action was brought in the district court of Cass county by Anton Schindler, plaintiff, against John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers, and the Burlington and Missouri River Railroad Company in Nebraska, defendants. The action is brought on a written contract for the erection of certain grain elevators by the plaintiff for the defendants. Also claiming, in addition to the contract price for the erection of said elevators, an amount for extra work rendered necessary by reason of changes of the plans of said buildings after the execution of the said contract.

The defendants Morrissey Brothers answered, making a general denial of the allegations of the petition, and especially denying any contract or liability jointly with their co-defendant the Burlington and Missouri River Railroad Company in Nebraska. As a second answer and defense to the said petition the defendants alleged the making and executing of a contract in writing between themselves, in their firm name of Morrissey Brothers, and the plaintiff, a copy of which contract is attached to the said answer, and is the same as that mentioned in the petition of the plaintiff. In their said answer the defendants "aver that neither at the time of the execution of the said contract or subsequently did the said defendant railroad company have any interest whatever in said contract or in the subject matter thereof, which said contract these answering defendants aver the said plaintiff is now seeking to enforce in this action as the joint contract of these answering defendants and said defendant railroad company with said plain-

tiff, wherefore these answering defendants aver that there is a misjoinder of causes of action herein, and also an improper joinder of defendants herein." The said defendants then, as a third defense, set out at length the making of the said contract by the plaintiff with them for the furnishing of the necessary labor and mechanical skill and the erection and completion of nine grain elevators at different points along the line of the road of said defendant company, according to the terms and specifications of said written contract, for which work, when fully performed and finished according to the terms of said contract, the answering defendants were to pay the plaintiff the sum of fifteen hundred and fifty dollars. That after the performance of part of said work, and on or about the first day of September, 1882, the said plaintiff, without any just cause, abandoned the same and discontinued the work on said grain elevator buildings, and has never since completed the same, though often requested. That during the part performance of said work the said defendants from time to time paid the said plaintiff on account of said work and contract the sum of seventeen hundred dollars, at his request, etc. Defendants further aver that certain of said buildings were not built and finished in accordance with the said contract, and specify what ones and in what respects the same fail to comply with the terms of the said contract, to the loss and damage of the said defendants over and above the services rendered by the plaintiff in the sum of one thousand seven hundred and thirty-eight dollars.

There are also two more defenses plead by defendants, but they are substantially repetitions of the third defense. The answer concludes with a prayer for judgment against the plaintiff in the sum of three thousand dollars and costs. The plaintiff filed his reply denying all allegations of new matter contained in said answer, and alleging "That the defendants received and accepted said elevators with-

out claim of rebate, damages, or fault in particular. That they never made any claim of damages until the filing of the answer in this cause," etc.

The cause was tried to a jury. The record contains the following journal entry: "Pending which testimony the plaintiff dismissed said railroad company out of court, with costs. The court permits the same to be done and ordered the trial to proceed against the remaining defendants by themselves. To which ruling and order they each duly object and except."

Upon the consent of parties in open court the court delivered an oral charge to the jury, and no written instructions.

The jury returned their verdict for the plaintiff in the sum of three hundred and fifty dollars.

Upon the denial of a new trial by the district court the cause is brought to this court on error.

Thirty-nine errors are assigned. They are not all insisted upon by counsel in the brief; the more important of those which are, will be examined and disposed of in their order.

"1. The district court erred in allowing said defendant in error to dismiss out of court the Burlington and Missouri River Railroad Company in Nebraska, a defendant named in his petition, after a plea in abatement for a misjoinder of parties defendant and causes of action had been pleaded as a defense to said petition and an issue joined on said plea in abatement, and after a jury had been empaneled and sworn to try the issues joined in the pleadings therein," etc.

It is quite obvious, upon an examination of the record, that the railroad company should not have been joined as a defendant, but under the strict rules of the common law it was unnecessary for the defendants to plead such misjoinder in abatement. A plaintiff having sued several defendants in an action *ex contractu*, must in general have

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recovered against them all or be non-suited upon the trial. See Chitty's Pleadings, Vol. 1, 51. But all of this is changed by the Code, and it may be said that the necessity for a reform in the system of practice which resulted in the new system of pleading and practice in New York and other states, including our own, was more sharply illustrated in the provision of the common law above stated than in any other.

Section 429 of the Code provides that, "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. It may determine the ultimate rights of the parties on either side as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper," etc. It will therefore be readily seen that no defense on the part of "the answering defendants" could be predicated upon the misjoinder of the railroad company as a party defendant.

The above also applies to the second error assigned, which is, that "The court erred in proceeding to a trial of the issues joined between said defendant in error and these plaintiffs in error after said railroad company had been dismissed out of court without empaneling another jury and swearing them to try the issues mentioned in this assignment of error against the objection and exception of these plaintiffs in error." In this I do not think the court erred, but on the contrary, to have done otherwise would have been to sacrifice substance to form, to increase expense, and cause unnecessary delay; three things to be avoided.

Under this head also, the plaintiffs in error in their brief claim that, "The court erred in admitting in evidence

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plaintiff's exhibit 'A,' it being the contract for the erection of these elevators in question, because it was not the joint contract of all of these defendants, and because it appeared on its face to have been executed by Schindler and the firm of Morrissey Brothers, under their firm name, the existence of no firm having been alleged in the petition."

It does not appear from the record whether the exhibit referred to was introduced before or after the dismissal of the case as against the railroad company. If afterwards, then certainly it was no objection to its introduction, that under the former or original condition of the pleadings it may not have been admissible. If before then, though probably not admissible, the error of its admission, if any, was cured by the elimination from the record of the name of the party whose presence there rendered its admission objectionable. As to the latter clause of the objection, it is deemed sufficient to say that in the title of the petition the defendants are described as "John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers," etc. So that the defendants were sued as a firm although the word "firm" may not have been used.

"3. The court erred in allowing defendants in error to ask questions numbered in the bill of exceptions as follows," etc. The first group of questions objected to under this head is set out in the bill of exceptions as follows: But that it may be understood I will commence a few questions and answers back of those objected to—the plaintiff as a witness in his own behalf being examined in chief.

Q. 52. I will ask you to state if the contract was changed or modified between you and the Morrisseys?

A. Yes, sir.

Q. By Crites, counsel for defendants: Was the change in writing?

A. No.

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Q. Was that all the writing that you made in the contract?

A. Yes, sir.

Q. By the court: Changed by talk?

A. Yes, sir.

Q. You may state what change was made in regard to the size of the buildings?

A. The first time it was 24x24 and 20x20, being all 24x24.

Q. All there was said, if anything, and what change if any made in regard to your lost time, going to Plattsmouth and back, and your railroad fare?

Q. By the court: Was there any such a change made about the transportation?

A. Yes.

Q. By the court: Was that in writing?

A. No, sir. Just the same way; I told him I had to come here twice a week. [*Crites objects. Incompetent, immaterial, and irrelevant. Overruled and exception.*] I had buildings here, Goos', etc. I had to attend to them, and he said sure we will let you in here twice a week and pay what it costs you. I told him we had more trouble on that elevator; he said, I don't want you to lose in there; he said I will pay you every cent that you lose on those buildings. I could not say whether it would cost more, but he said I don't want you to lose any.

Crites objects to this testimony. Incompetent, immaterial, and irrelevant, tending to change and alter a written contract without consideration, and I move to strike it out. Motion overruled and exception.

Q. State what was the value of your time and fare coming from Waco to Plattsmouth?

Crites makes the same objection. Overruled and exception.

A. I guess it was about seven dollars. Six ninety-five or seven dollars I paid.

It is deemed sufficient to say of these objections, that it is believed to be the law as now settled, and in the absence of authorities to the contrary it will be so held, that it is competent to prove by oral testimony a change in or a modification of a written contract made subsequent to its execution, and that in a proper case such change or modification may rest upon the consideration upon which the original contract is based.

It is not deemed necessary to go over the other points raised in the brief on the reception and rejection of testimony, as none of them are deemed to be of controlling importance in the case.

4. Upon consent of parties the court instructed the jury orally. Consequently the charge is very lengthy and not separated into paragraphs or numbered. I will therefore only speak of the charge as a whole. Plaintiffs in error, in their brief, object to the charge on the ground that the court told the jury that they might consider the evidence before them tending to prove the plaintiff's items of extra work and expense under the head of lost time and car fare in traveling from point to point between the sites of the several elevators, and between any of them and Plattsmouth, the common base of operations and supplies. Now I think that there is sufficient in the petition as a foundation for the evidence introduced and admitted to prove these items; there certainly is evidence tending to prove them, that the time was lost and the expense incurred traveling on the cars; also tending to prove that defendants agreed to pay for it, consequently it became and was proper matter for the consideration of the jury.

There was also evidence tending to prove the defendants' counter-claim. This counter-claim is for damages alleged to have been sustained by the defendants by and on account of the failure and refusal of the plaintiff to erect and complete the elevators in question according to the original contract and the plans and specifications upon which

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the same were based. Now it is not only alleged in the plaintiff's petition, but there is evidence tending to prove, that by mutual consent and agreement between the parties the original plans and specifications were in the main abandoned, and the elevators neither built by plaintiff or desired to be built by defendants in accordance therewith. The least that can be said of this evidence is, that it tends to disprove the defendants' counter-claim. Hence it, as well as the evidence tending on the other hand to prove the counter-claim, was, as I think, properly submitted to the jury by the charge of the court.

By the terms of the contract the plaintiff was to furnish the labor and mechanical skill for the construction of these elevators, the lumber and other material to be furnished by the defendants. On the subject of the defendants' claim for damages on account of the work not having been done in accordance with the contract, the court in the charge said: "In respect to any damages which may have occurred to the buildings in consequence of their not being erected according to the contract, I will say this, that for any defects in the buildings, any departure from the plans and specifications that have been occasioned through the plaintiffs' fault, in failing to erect them and do the business in a workmanlike manner, as the contract requires, he ought to be responsible, but for any defects in the buildings which have been occasioned in consequence of defective lumber, as to the kind of lumber which the defendants should have furnished, he should not be responsible. He was only bound to use such lumber as they furnished him, in a proper and judicious manner. The defendants furnished the lumber; he should be held only responsible for the proper use of the lumber furnished him. If he did do that and did the best he could under the circumstances, that is all that could justly be required of him." The exception of plaintiffs in error to this portion of the charge cannot be sustained.

Post v. Garrow.

Plaintiffs in error, in the brief, except to the form of the verdict, and particularly to the title, the same being "*Anton Schindler v. Morrissey Bros. et al.*" While I do not think that any caption or title at all was necessary to the validity of the verdict, yet one being used, I doubt that counsel could improve it. All the purpose which a title could serve in a verdict would be to identify it with the case. The true title of the case being "*Anton Schindler v. John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers, and The Burlington & Missouri River Railroad Company in Nebraska,*" it serves all purposes of identification and is quite within the practice to use the abbreviated form here used. The title of the case was not changed by the dismissal of it as against the railroad company. As to the substantial part of the verdict, I think it correct. Counsel are in error when they speak of this as an action of debt on a written contract. It was an action for damages for a breach of contract, and a verdict for damages was correct.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	682
25	518
18	682
31	579
18	682
36	641
18	682
38	184
18	682
42	344
18	682
47	411
18	682
49	94
55	160
18	682
57	601

W. D. POST, PLAINTIFF IN ERROR, V. ALEXANDER GARROW ET AL., DEFENDANTS IN ERROR.

1. **Contracts: TIME OF PERFORMANCE.** When the day of performance of contracts other than instruments upon which *days of grace* are allowed, falls on *Sunday*, that day is not counted, and compliance with the stipulations of the contract on the next day (*Monday*) is deemed in law a performance. *Satter v. Burt*, 20 Wend., 205.

Post v. Garrow.

2. ———: PETITION IN SUIT ON. Where in an action on a written contract a copy of the contract is attached and referred to in the petition, a statement of the terms of the contract in the body of the petition will not be stricken out, on motion, as redundant nor as irrelevant matter.
3. ———: FORFEITURE. For the purpose of effecting a forfeiture of money advanced on a contract which has not been performed, the party claiming such forfeiture must show a readiness and willingness on his part to keep and perform the contract in every particular.
4. Instructions considered and approved.
5. Contract for Sale of Cattle: EVIDENCE: TENDER. In the case of a contract for the sale and delivery of cattle at so much per lb. or cwt., when, upon the day appointed for the execution of the contract, the seller refuses to weigh and deliver the cattle and declares the contract at an end, in an action by the buyer for damages for the non-delivery of the cattle, *Held*, Not incumbent on the plaintiff to prove a *tender* of the purchase money.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan, for plaintiff in error, cited: 2 Benjamin on Sales, § 1054. *Metz & Albrecht*, 52 Ill., 491. *Clark v. Dales*, 20 Barb., 42. *Porter v. Rose*, 12 Johns., 209. *Garret v. Gonter*, 42 Penn. State, 143. *Kitzinger v. Sanborn*, 70 Ill., 146.

M. L. Hayward and *Scott & Gilbert*, for defendants in error, cited: *Avery v. Stewart*, 2 Conn., 69. *Barrett v. Allen*, 10 Ohio, 426. *Salter v. Burt*, 20 Wend., 205. *Barnes v. Eddy*, 12 R. I., 25. 2 Parsons on Cont., 178 and 179—4th Ed. 2 Hill, 378, note b. *Brooklyn Oil Refinery Co. v. Brown*, 38 How., 449.

COBB, CH. J.

The principal question in this case is, whether a contract for the sale of cattle, "to be delivered at Bradshaw station on or before May 20, 1883," May 20, 1883, being

Sunday, became due and terminated on that day, or did it continue alive and capable of being executed during the whole of the following Monday.

The cases cited by counsel for defendants in error seem to settle, to my satisfaction at least, the law to be, "That," in the language of Gould, J., in the leading case of *Avery v. Stewart, Sup.*, "as *Sunday* cannot, for the purpose of *performing* contracts, be regarded as a day in law, it is as to that purpose to be considered as stricken from the calendar, though *intervening Sundays* are, doubtless, to be counted as in all other computations of time, because they are not appointed for the *performance* of any act. And this rule applies to all time contracts except those where, under the statute or the law merchant, days of grace are allowed."

The day for the performance of the contract sued upon, then, being Sunday, the true day for its performance and termination was Monday, the 21st day of May, 1883.

The contract contains a further provision in the following words: "Said steers to be weighed at feed lots any time in afternoon before 6 o'clock." Upon this provision and the evidence applicable thereto the plaintiff in error, in his brief, raises the question that, even if the defendants in error had all of the 21st day of May in which to receive and pay for the cattle, the terms of the contract providing that the cattle should be weighed before 6 o'clock being also applicable to Monday the 21st, the plaintiffs were not in time to claim the benefit of said contract. It is probably sufficient to say upon this point that the evidence being conflicting as to the precise point of time at which the agent of the plaintiffs arrived at the place where the cattle were, ready to witness the weighing, and the jury having found for the plaintiffs, it must, for the purposes of this opinion, be assumed that said agent arrived there and met the defendant at five minutes before 6 o'clock of the 21st day of May, by railroad time, which, in 1883, was some-

what faster than sun time. The only possible ground, then, upon which plaintiff in error can claim a forfeiture of the contract is, that at the time of the arrival of the agent of the plaintiffs at the place where the cattle were, there did not remain sufficient time to complete the weighing of the cattle before 6 o'clock. It is not clear, in any event, whether the true meaning of the contract is that the weighing of the cattle should be completed before 6 o'clock. Probably its terms would be fully complied with upon the weighing being commenced before 6, to be completed in good faith. And that construction would certainly be given it, when, as in this case, the former construction would involve a forfeiture. According to the evidence it would take from a half to three-quarters of an hour to weigh the cattle. On that day the sun set at ten minutes after seven o'clock. Had the weighing commenced at five minutes before six, it would have been certainly completed more than a half hour before sundown.

It seems from the bill of exceptions that on this day, the 21st day of May, the cattle were two miles south of Bradshaw. There is no evidence as to where they were at the time of the making of the contract, nor as to what "feed lots" were contemplated by the use of that language in the contract. True, it would be presumed that the cattle were, on the 21st day of May, in the same feed lots as at the date of the contract, were it not that on the 7th day of April, as shown by exhibit K, plaintiff in error wrote to Garrow Bros., among other things, "My feeder leaves middle of next week, and I must move the cattle then." The language of the contract providing for the delivery of the cattle "at Bradshaw station on or before May 20," and again "said steers to be weighed at feed lots any time in afternoon before 6 o'clock," would seem to me, in the absence of any explanation, to indicate that the steers were then in feed lots at Bradshaw station.

It must be borne in mind that the plaintiff in error had

received three hundred dollars of the purchase money for the cattle in question. This money he claims as a forfeit by reason of his having complied with the terms of the contract in every particular on his part, while the defendants in error have failed to comply with the terms of the contract. By the terms of the contract he agreed to deliver the cattle at Bradshaw station on or before May 20, 1883, at buyers' option. He could not technically comply with this contract without having the cattle at Bradshaw station ready to be delivered on that day, or that day being Sunday, on the next day, unless he was prevented by some act of the defendants in error. And had the defendants in error failed to be present either in person or by agent at the time fixed upon by another clause of the contract for weighing the cattle, would that be such an act or omission on their part as would enable the plaintiff in error to claim the fulfillment of the contract on his part without having the cattle at Bradshaw station at all? Possibly there may be something in the usages or necessities of the business of buying and selling fat cattle to take the case out of the general rules and principles of law, but if so, it is not indicated by the language of the contract, or shown by the evidence.

Upon the trial the defendant moved to strike out certain matter from the plaintiff's petition as irrelevant and redundant, and the overruling of this motion is assigned for error. Without discussing the question whether this court would reverse the judgment for the overruling of said motion by the district court, even were it never so erroneous, I think that the said motion was properly overruled. The theory of the motion seems to be, that the plaintiff having referred to the contract, and attached a copy of it to the petition, then any statement of the terms of the contract in the petition was irrelevant and redundant. The practice of attaching copies of written instruments to petitions doubtless is based upon the provisions of section 124 of

the Code. But even in cases where, under the provisions of that section, it is necessary that a copy of an instrument be attached to a pleading, and filed therewith, the pleader is not necessarily thereby excused, much less precluded, from stating the facts upon which his action or defense is predicated.

The demurrer was also properly overruled. There were five causes of demurrer alleged therein. Four of them are abandoned, or at least not relied on in the brief. The third ground, "That said petition does not state facts sufficient to constitute a cause of action," cannot be sustained. The allegation of the petition, "That at the time said cattle were to be delivered plaintiffs went to Bradshaw station, where said cattle were to be delivered, and not finding the defendant or the cattle there, went to his, defendant's, house and yard, and there demanded of him said cattle so sold to them, and then and there offered to pay him for the same, but defendant then absolutely refused to let plaintiffs have said cattle or any part thereof, and wholly failed and refused to keep his said contract, and he has ever since failed and refused, and now refuses, to comply with said contract," etc., is a good assignment of a breach of the contract by the defendant, and of willingness and readiness on the part of the plaintiffs to comply with their part of it. The law of *tender* does not arise in the case.

With other instructions given by the court to the jury on the trial the following were given, which are assigned for error by plaintiff in error :

"10. In an action for breach of an executory contract to deliver personal property, in the absence of fraud or stipulation to the contrary, the rule is actual compensation. The injured party may recover his loss sustained.

"11. In such case, if the value of the property sold has advanced, the damage is the difference between the contract price and the market price at the time and place of deliv-

ery, and in case of payment by the buyer of all or part of the purchase price he is entitled to such difference between the contract and market prices, in addition to the sum paid on the contract, and seven per cent interest on the sum paid on the contract from the breach thereof."

Whatever might be said of the 10th instruction, as standing alone, and as applicable to a different state of proof, upon the evidence in this case, and considered in connection with the 11th instruction, it fairly expresses the law, as I understand it.

Plaintiff excepts to instructions 5, 6, and 12, and makes the point in his brief that in them the court calls the attention of the jury to only a part of the facts introduced to make out the defendant's case, and excludes other facts material to the issue made by the defendant. Instructions 5 and 6 refer to the claim on the part of the defendant that he had bought the cattle back from the plaintiffs. But I do not think that there was any evidence of a second contract between the parties to go to the jury. But if there was, and the defendant was dissatisfied with the charge submitting that part of the case to the jury, on the ground that it did not comprehend the whole of it, or go far enough, he should have presented an instruction to the court embracing the law applicable thereto as he understood it. Upon such instruction being presented and refused, the point could be presented to this court, otherwise I don't think it can.

As to instruction number 12, it simply tells the jury that in case they find for the plaintiffs they shall assess the amount of their recovery according to the rule announced in the last instruction (No. 11).

Plaintiff in error makes the point that the court ought also to have instructed the jury as to the measure of damages applicable to the counter-claim of defendants. Upon that point, in addition to what is above stated as to the necessity of a party who is dissatisfied with an instruction,

for the reason that it does not go far enough, of presenting a proper instruction to the court to supply such deficiency, I will add that, as in my view the evidence did not even tend to prove the defendant's counter-claim, for the court to have laid down rules for the guidance of the jury in case they should find for the defendant on such counter-claim would have tended to mislead and confuse, and not to assist them in the discharge of their duty.

Plaintiff in error also complains of the refusal of the court to give in charge to the jury the following instruction requested by him:

"It is a rule of law that in sales of property, unless otherwise expressed, it is implied that the seller may retain the possession until the price is paid, and where a day certain is fixed upon within which the consideration is to be paid and the property delivered, payment or a tender thereof within the time limited must be made, or the seller cannot be compelled to part with his property; and the court therefore instructs the jury that if they find from the evidence that the plaintiff did not make a tender of payment until after the 20th day of May, 1883, at 6 o'clock in the afternoon of said day, then the tender of plaintiffs was too late, and gave them no right to take the cattle, and the jury should find for the defendant."

There are many good reasons for the refusal to give this instruction. It is not applicable to the evidence in the case. It assumes that the contract should have been executed on the 20th, although that day was Sunday; and it assumes that it was the duty of the plaintiff to make a tender to the defendants after he had refused to weigh the cattle and declared the contract at an end. We have already seen that such is not the law.

Having carefully examined the points made by plaintiff in error in his brief upon the several questions of the admission and rejection of testimony, whether the verdict

Johnson v. M. P. R. R. Co.

is sustained by the testimony, and whether the damages are excessive, I find no reversible error.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN JOHNSON, ADMINISTRATOR OF THE ESTATE OF OLE NILSSON, PLAINTIFF IN ERROR, v. THE MISSOURI PACIFIC RAILWAY COMPANY IN NEBRASKA, DEFENDANT IN ERROR.

1. **Pleadings: AMENDMENT: PRESUMPTION.** Where amended pleadings are filed in the district court and properly certified to the supreme court as a part of the transcript, it will be presumed that such pleadings were filed regularly and with the knowledge or permission of the district court, and they will be treated as properly in the record.
2. **Trial: QUESTION FOR JURY.** If the evidence introduced tends in any degree to sustain all the allegations of the petition, the cause should be submitted to the trial jury, and it is error to instruct them to return a verdict for defendant.
3. ———: ———. Though it is true in many cases that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury, this is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from them. And whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should be left to the jury. *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332.
4. **Damages: QUESTION FOR JURY.** In an action for damages alleged to have been sustained by the next of kin to a deceased, whose death is alleged to have been caused by the negligence of the defendant, the question as to the amount of damages sustained by reason of such death is for the jury to determine, under such testimony as to the measure of damages as may be submitted to them.

18	690
37	250
18	690
39	614
18	690
41	126
18	690
43	272
18	690
53	741

5. **Railroad: NEGLIGENCE: ACCIDENT TO EMPLOYEE ON SUNDAY.** Where a railroad company finds it necessary to run its trains on the first day of the week, commonly called Sunday, and also finds it necessary for its employees to labor on that day in keeping its track in proper order and repair for the use of such trains, and while so engaged an employee is injured or killed by the negligence of such railroad company, the fact that the accident occurred on that day will not exonerate the company from liability.
6. ———: **NEGLIGENCE A QUESTION FOR JURY.** In an action for damages caused by a personal injury, resulting from the alleged negligence of the defendant, and some testimony is adduced tending to prove such negligence, the question as to whether the defendant was or was not guilty of negligence must be decided by the jury, and therefore all evidence bearing upon that subject should be submitted to them.

ERROR to the district court for Douglas county. Tried below before **WAKELEY, J.**

Congdon, Clarkson & Hunt, for plaintiff in error.

1. Defendant can not exonerate itself upon the proposition that the accident resulted from the act of God, unless it shows that it was guilty of no act which contributed to the accident. *Shearman & Redfield on Neg.*, p. 6, § 5. *Pruitt v. Han. & St. J. R. R.*, 62 Mo., 527-541. *Hutchinson on Carriers*, p. 145, § 186. *Michaels v. N. Y. Cen. R. R.*, 30 N. Y., 564. *Read v. Spaulding*, 30 N. Y., 630. *Bostwick v. B. & O. R. R. Co.*, 45. N. Y., 712. *Condict v. Ry. Co.*, 54 N. Y., 500. *Wolf v. Am. Ex. Co.*, 43 Mo., 421-425. Nor upon the proposition that intestate was working upon Sunday, contrary to the laws of this state. *Comp. Stats.*, p. 703. Repairing a railroad should certainly be regarded as a work of necessity, and if it were not, the weight of law is against the position of defendant. *McGatrick v. Wason*, 4 O. S., 566. *Sutton v. The Town of Wauwatosa*, 29 Wis., 21, and cases cited. *Knowlton v. Mil. City Ry. Co.*, 59 Wis. 278. Nor upon the propo-

sition that road was operated by another corporation, or that another corporation controlled the rolling stock. *Abbott v. Johnstown Horse R. R. Co.*, 80 N. Y., 27. *Nelson v. Vt. & Can. R. R. Co.*, 26 Vt., 717. *Railroad Co. v. Brown*, 17 Wallace, 445. *Rorer on Rys.*, Vol. 1, p. 607 and cases cited. *Ill. Cent. R. R. Co. v. Barron*, 5 Wallace, 90.

2. The court below found as a matter of law that Nils-son was guilty of contributory negligence. He was an ignorant Swede, but just arrived in this country. He was inexperienced. He had been ordered by his section boss to place the hand-car on the track for the purpose of going back to Talmage. All supposed the road before them clear. No train was due for hours. He was obliged to hold the hand-car; the storm was severe; and in its rush and fury, with his superior almost within reach, whose duty it was to warn him against any possible danger, he lay down under the car and met his death. It does not follow that because he was killed while in that position, that, under the circumstances of this case, he was guilty of contributory negligence as a matter of law. The question should have been left to the jury. *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332. *C. & St. P., M. & O. R. R. Co. v. Lundstrom*, 16 Neb., 254. *Gray & Bell v. Scott and wf.*, 66 Pa., 345. *Corey v. N. P. Ry. Co.*, 21 N. W. Rep., p. 479. *McKean v. B. C., R. & N. R. Co.*, 55 Ia., 192. *Morris v. C., B. & Q. Ry. Co.*, 45 Ia., 29. *Berry v. Cen. Ry. Co.*, 40 Ia., 564. *Bucklew v. Cen. Ia. Ry. Co.*, 21 N. W. Rep., 103. *Pringle v. Chi. & R. I.*, 21 N. W. Rep., 108. *Crowley v. Burlington C. R.*, 20 N. W. Rep., 467. *Buell v. N. Y. Central*, 31 N. Y., 314. *Miller v. U. P. Ry.*, 4 McCrary, 115. *Miller v. U. P. Ry.*, 5 McCrary, 300. *Bohan v. Mil., L., S. & W. Ry. Co.*, 58 Wis., 30. *Ferguson v. Wis. Central Ry. Co.*, 23 N. W. Rep., 123. *Knowlton v. Mil. City Railway Company*, 59 Wis., 278. *N. W. Railway Company v. Bayfield*, 37 Mich.,

205. *Walsh v. Peet Valve Company*, 110 Mass., 23. *Strahlendorf v. Rosenthal*, 30 Wis., 674. *Coombes v. New Bedford Cordage Company*, 102 Mass., 572.

Charles Ogden and Everest & Waggener, for defendant in error.

1. There is no allegation in the pleadings nor proof upon the trial that defendant company had in its employ any incompetent servants; therefore the law implies that all legal duties in examination and inspection of the car in question had been exercised and complied with before the accident complained of. 135 Mass., 201. 50 Iowa, 680. 1 Am. & Eng. Rwy. Cases, 101. 2 Id., 140. 5 Id., 480. 11 Id., 193. 54 Wis., 257, pp. 267-282.

2. There is no allegation or proof that the car in question was defective, unsafe, or imperfect when received. *Kidwell v. Railway Co.*, 3 Wood U. S. C. C., 313.

3. Defendant company had the right to imply and rely upon it; that when the deceased entered its employ he was a person of ordinary understanding, care, and caution, and would exercise ordinary care to prevent injury to himself. The company could not be required to anticipate that he would place himself in any unnecessary peril or in any unnecessary perilous position. *R. R. Co. v. Plunkett*, 25 Kansas, 201.

4. The allegations of plaintiff's petition were, that the negligence of defendant company, which caused the injury, was in leaving the car in question on defendant's track, unwatched, and with the brakes unset, on down grade. This the plaintiff had to prove by preponderance of evidence, and to prove the negligence in the manner alleged. *Manuel v. Ry. Co.*, 56 Ia., 655. *Haines v. Ry. Co.*, 41 Ia., 227. *Muldowney v. R. R. Co.*, 32 Ia., 176. *Owen v. Owen*, 22 Ia., 270. *Waldhier v. R. R. Co.*, 71 Mo., 514. *Edens v. R. R. Co.*, 72 Mo., 212. *Price v. Ry. Co.*, 72

Mo., 414. *Ry. Co. v. Troesch*, 68 Ill., 545. *Ry. Co. v. Foss*, 88 Ill., 551.

5. The invariable rule is, that a party whose negligence is the proximate cause of the accident cannot recover for the injury sustained. *Fleming v. R. R. Co.*, 49 Cal., 253. *De Ville v. R. R. Co.*, 50 Cal., 383. *Potter v. R. R. Co.*, 21 Wis., 372. And where, as in this case, the facts are clearly settled and the course which common prudence dictates can be clearly discerned, it was the duty of the court to decide the case as a matter of law. *Sherman & Redfield on Negligence*, § 11, p. 13. *Glassey v. R. R. Co.*, 57 Penn. St., 172. *R. R. Co. v. McClurg*, 56 Penn. St., 294.

6. While some of the authorities hold that contributory negligence on the part of the plaintiff is a matter of defense to be proved by the defendant, still this rule does not prevent the trial court from directing judgment as in case of nonsuit, if the evidence introduced by plaintiff established the defense of contributory negligence. *Hoth v. Pelers*, 55 Wis., 405. *Schuchardt v. Allens*, 1 Wallace, 370. *Parks v. Ross*, 11 Howard, 362. *Bliven v. N. E. Screw Co.*, 23 Howard, 433. *Improvement Co. v. Munson*, 14 Wallace, 442. *R. R. Co. v. Miller*, 25 Mich., 274. *Abbott v. Ry. Co.*, 30 Minn., 482.

7. The rule is well settled, that where it appears by plaintiff's evidence when he rests his case, that his own negligence contributed to the injury for which he sues, that it is the duty of the court to grant a nonsuit. *Express Co. v. Nichols*, 33 N. J. Law, 434. *R. R. Co. v. Moore*, 4 Zabriskie, 824. *Aycriggs Ears., v. R. R. Co.*, 30 N. J. Law, 460. *Harper v. Ry. Co.*, 32 N. J. Law, 88.

REESE, J.

Counsel for defendant in error, both by his brief and in the oral argument, called the attention of the court to the alleged fact that the amended petition of defendant in error

attached to the record was filed without his knowledge, and without permission from the district court, and presents the case in this court upon the original petition alone, disregarding the amended petition. By an examination of the record we find the amended petition copied into the transcript, duly certified by the clerk of the district court, and treated in all respects as the other proceedings in the case. This being the case we must treat the amended petition as being properly in the transcript and properly filed in the district court. If objection is made to pleadings or other papers on file in the district court, the correction must be there made. All presumptions are in favor of the regularity of the proceedings. Irregularities cannot be presumed. They must affirmatively appear, and such irregularity must pertain to the action of the lower court, and not to its officers over which it has control and whose mistakes and errors, if any, it is the province of that court to correct.

This action was instituted by plaintiff in error, as the representative of Ole Nilsson, deceased, for the recovery of damages alleged to have been sustained by reason of a personal injury inflicted upon the said Nilsson, and by which he was killed. The cause was tried to a jury, who, after hearing the testimony offered by plaintiff, under the direction of the court returned a verdict in favor of defendant; the learned judge sitting at the trial holding that the facts proved did not constitute a cause of action in favor of plaintiff. Plaintiff excepted to the instruction of the court, and now, among other things, assigns the same as error. The testimony, as shown by the bill of exceptions, consists in part of the testimony of witnesses before the court and jury, in part by depositions, and in part by a stipulation of facts filed in the case and read to the jury.

The question presented is, whether or not the court, upon the close of plaintiff's testimony and upon motion of defendant, erred in instructing the jury to find for the defendant, upon the theory that the testimony introduced did not

make a case upon which the jury should pass. This question was before this court in *Smith v. S. C. & P. R. R. Co.*, 15 Neb., 583. In that case it is said that, "by the interposition of the motion the defendant admitted not only the truth of the evidence but the existence of all the facts which the evidence conduces to prove, as well as inferences to be drawn from it. The only question is, whether all the material facts alleged in the petition have been supported by some evidence, however slight. It matters not how slight this evidence may have been, if any was produced the motion should have been overruled, because it is the right of a party to have the weight and sufficiency of his testimony passed upon by the jury." See also *Ellis & Morton v. Ins. Co.*, 4 O. S., 646. *Stockstill v. R. R. Co.*, 24 Id., 86. *Way v. R. R. Co.*, 35 Iowa, 586. *Davis v. Steiner*, 14 Penn. St., 275.

The petition, in stating the facts of the accident, alleges, in substance, that at the time of the injury the deceased was in the employ of the defendant, working with other laborers in and about the road-bed of defendant as a section hand, under the supervision and direction of a foreman or boss, who was in defendant's employ, and under whose orders the deceased labored. That in connection with said work, and for the purpose of transporting themselves and tools to the work, the said foreman and laborers used and operated a hand-car owned by defendant. That after they had gone to their labor, at a point on the line of the railroad about one mile south of Talmage, a station on the road, and had removed the hand-car from the track, a violent wind and rain storm came up and forced them to desist from their work. That by order of the foreman the hand-car was placed back upon the track, boarded by the laborers, including deceased, and they all started back to Talmage. That defendant had carelessly left standing upon the side track a freight car, the brakes of which were so out of order and broken that they could not be set, and

of which defendant had notice, and that by force of the wind this car was driven from the side track onto the main track of the railroad and down a descending grade onto and over the hand-car and those thereon (they being so blinded by the storm as to be unable to see it), and by which the deceased was injured, and soon thereafter, from the injuries, died. The petition also negatives any negligence on the part of the deceased.

The stipulation of facts, as well as the testimony, shows substantially that when the storm became violent the workmen quit work. The foreman ordered the hand-car to be replaced upon the track, but at that time the storm was so violent that it could not be propelled against it, and that the deceased then, of his own volition, with several other section men, got under the hand-car and laid down on or between the rails with their faces downward, for the purpose of holding the hand-car from being driven south before the storm, and to shelter themselves from the severity of the wind and rain, and while lying in this condition a freight car which had been left standing upon the side track at Talmage was driven by the storm onto the main track and on a downward grade at a rapid rate toward where the deceased and other workmen were, and that it, by force of the storm, was driven onto and against the hand-car with such violence as to cause the death of deceased. The testimony shows that the freight car was standing a distance of from ten to twenty feet from and south of the other cars upon the side track, that the brakes were not set, and could not be set owing to the condition of the brake, it being out of repair. As to how long the brake had been broken the testimony does not show, but it is fully proven that on the day previous the car was unloaded and the brake at that time was broken so that it was useless. The switch connecting the side track with the main line track was what is known as a split switch, and permitted the car to pass out onto the main track.

The condition in which this car was left would be sufficient evidence of negligence to warrant the court in submitting that question to the jury, under proper instructions, under the rule in *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332. But it is insisted that the action of the deceased in placing himself under the car under the circumstances which he did was contributory negligence upon his part to such a degree as would prevent his recovery, no matter what the proof of negligence as to the defendant in error might be, so long as it was not wanton or willful. A majority of the court instruct me to say that in their opinion the question of negligence on the part of deceased was also one which ought to have been submitted to the jury. At the time of the accident there was no train due. It was on Sunday and no regular trains were run on that day, yet irregular trains used in the construction and reparation of the road were liable to pass, ordinarily, at any time. Deceased was under the command of the section boss. By his order the hand-car was placed on the track for the purpose of going back to Talmage. He had charge and supervision of deceased so far as to control his actions in and about the employment. Why he did not direct the hand-car to be removed from the track is not shown. He remained standing near the track, and within six feet of the hand-car until the approach of the freight car. Deceased might to some extent depend upon him and others standing by for notice of an approaching train or other danger, the position of deceased being such that he could not. Deceased was inexperienced and not acquainted with the English language, which was known to the foreman or section boss. Under the circumstances of the case it was for the jury to say whether the conduct of the deceased amounted to negligence. *Gray v. Scott*, 66 Pa., 345. *McKean v. R. R. Co.*, 55 Ia., 192. *Morris v. R. R. Co.*, 45 Id., 29. *Bohan v. R. R. Co.*, 58 Wis., 30. *A. & N. R. R. Co. v. Bailey*, *supra*. *R. R. Co. v. Stout*, 17 Wall., 657. *R. R. Co. v. Kirk*, 90 Penn. St., 15.

It is contended that the proof does not show that deceased was under the direction of the foreman Courtney, and that under the evidence he, Courtney, sustained no such relation to deceased as vice principal of defendant. It is true the testimony upon this point is meager, but enough is shown by the stipulated facts to amount to at least *some* evidence upon this point, the stipulation being to the effect that the intestate, in company with others, "went to their work under the direction of Owen Courtney, defendant's section boss," and that the hand-car was placed upon the track under his direction, etc. This was enough to submit the question to the jury.

It is claimed by defendant in error that no pecuniary injury resulting from the death is shown by the evidence. The action was brought under the provisions of the act of May 1st, 1873, Compiled Statutes, chapter 21. By the second section of that act it is provided that, "the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars," etc. The testimony shows that the deceased was an unmarried man, that his mother was dead, and his father is the next of kin. It is shown by the testimony of the father that he had received no aid from the deceased since the arrival of deceased in this country, the father being a resident of Sweden. It is also shown that the deceased had been in this country but a short time. We think the question here presented can have application only to the measure of damages. If it should appear upon trial that the father suffered no damage in the death of the son, it is probable there could be a recovery only for nominal damages. But, it is said that the word "pecuniary" as used in our statute is not construed in a strict sense. The damages are largely prospective, and their determination committed to the discretion of juries.

upon very meagre and uncertain data. A parent may recover for loss of expected services of children not only during minority, but afterwards, on evidence justifying a reasonable expectation of pecuniary benefit therefrom. Neither is it essential that this expectation of pecuniary benefit should be based on a legal or moral obligation on the part of the deceased to confer it, but it may be proved by any circumstances which render it probable that such benefit would, in fact, be realized. And as a right of action is given whenever the injured person, had he lived, could have maintained an action, at least nominal damages may be recovered. 3 Sutherland on Damages, 182, 183. *City of Chicago v. Scholten*, 75 Ill., 468. *Johnson v. R. R. Co.*, 7 O. S., 336. *R. R. Co. v. Killer*, 67 Penn St., 300. *McIntyre v. R. R. Co.*, 37 N. Y., 287. *R. R. Co. v. Kirk*, *supra*. *R. R. Co. v. Shannon*, 43 Ill., 338. *R. R. Co. v. Barron*, 5 Wall., 90. *Grottenkemper v. Harris*, 25 O. S., 510.

The accident occurred on a Sunday. It is claimed "that no damages could be recovered by plaintiff for injuries suffered by his intestate while engaged in the performance of an illegal act," common labor on the Sabbath day being prohibited by section 241 of the Criminal Code.

It is true that, subject to the exception named in the statute, ordinary labor on the first day of the week is in violation of law, but we cannot hold that under the circumstances of this case this statute will destroy the right to recover. One of the exceptions of the statute is that of railway companies running necessary trains. If railway companies assume to decide what trains are necessary, and in the exercise of that right find it necessary to run construction and material trains, as shown by the testimony of their engineer, and for the purpose of enabling them to do so require the labor of their track men to keep the track in a passable condition, it would require a stretch of imagination and a severe twisting of legal principles to hold that

under such circumstances they would not be liable for negligence resulting to an employe engaged in what they themselves held to be a work of necessity.

During the trial the witness Conger, who had moved the car on Saturday, was asked if at the time he moved the car the brakes on it were set. This was objected to by defendant as immaterial, irrelevant, and incompetent. The court decided that if the witness examined the brake and could state any facts tending to show that the brake was imperfect, he might state them. Plaintiff then offered to prove the fact of the brake being unset, the objection to which was sustained. This ruling is assigned for error. Under the rule laid down in *R. R. Co. v. Bailey*, 11 Neb., 332, it would seem that the question should have been answered by the witness and the testimony allowed to go to the jury for them to pass upon. It is true that the fact sought to be proved is of minor importance, yet in a remote degree it would have some bearing as a circumstance tending to throw light upon the question of negligence on the part of defendant.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

The other judges concur.

**HENRY PARRISH, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.**

DISSENTING opinion in case reported, *ante* p. 405.

REESE, J.

I cannot adopt the conclusion of the majority of the court in this case, and will, very briefly, give my reasons for such dissent.

First. I do not believe the instruction complained of was erroneous. It was clearly the province of the jury to decide as to whether there were "explanatory circumstances proven," or not. It is not my purpose to enter into an analysis of the testimony in the case, but will say that, as I read it, it presents a case of the magnitude, at least, of murder in the second degree. From the whole record it seems to me that the killing of the young man, Parker, was cruel and inhuman. His crime was that of trying to induce a drunken father to leave town and go home, and in trying to defend him from the attacks of a number of persons, in whom plaintiff in error was one. All the circumstances were before the jury. It was their province to pass upon them. It was then proper for the jury, if they found "from the evidence that Henry Parrish, the defendant, did kill and slay Elmer E. Parker," which, by their verdict, they did, and if there were no circumstances proven of an explanatory nature to reduce the degree of the crime, the presumption would be that it was murder in the second degree. Under the evidence I think the instruction was correct.

Second. But my principal objection to this decision is to the second point presented by the opinion of the majority. I have examined the motion for a new trial, petition in error, motion for a rehearing, and brief thereon, as well as the brief of the plaintiff in error upon the final

submission of the case, and in no single instance do I find any objection to the verdict of the jury, nor do I find any language which, by any rule of construction or distortion, could be so construed as to present even a hint that the plaintiff in error was not fully and entirely satisfied with the form of the verdict.

I do not believe it is the province of the supreme court to dispose of causes upon proceedings in error upon any other questions than those presented for adjudication, except when the question of jurisdiction or human life is involved. I do not believe the judgment in this case was void. I believe the verdict did confer "power on the court to pass sentence on the accused," unless he objected to that verdict. He had the right to waive the objection if he wanted to, and when he has deliberately elected so to do I know of no authority to deprive him of that right.

In *Walrath v. The State*, 8 Neb., 38, Judge LAKE, in writing the opinion of the court, says: "The evident intention in requiring the motion for a new trial to be in writing was to fully apprise the judge to whom it might be addressed of the matters claimed to be erroneous, and on which the party complaining relies for a new trial. * * The proceeding (error) by which this is here is one of review only. Under it the only questions proper for our consideration are those that have been first ruled on in the court whose record is before us, and the record itself must show the questions to be such. The presumption is that no prejudicial error has been committed, and it is not too much, indeed good practice demands it, to require a party who complains of such errors to point them out so distinctly in his motion for a new trial as to advise the court of just what he relies on. The rule in this particular is the same as in civil cases."

In *Dodge v. The People*, 4 Neb., 228, the present Chief Justice MAXWELL, in writing the opinion of the court, says: "In this country the almost uniform practice has been to

extend to criminal cases, so far as the revision of verdicts is concerned, substantially the same principles which have been established in civil cases; and by statute in this state after a verdict of guilty a defendant may move for a new trial on any or all of the points therein set forth; and it is his duty in such a case to bring before the court, by his motion, all the reasons which are known to exist for setting aside the verdict and granting a new trial. There is no reason why the same rule in that respect should not apply in criminal as in civil cases."

This doctrine has been uniformly applied to civil cases by this court. We do not know of a single exception. See *M. P. R. R. Co. v. McCartney*, 1 Neb., 398. *Mills v. Miller*, 2 Id., 317. *Cropsey v. Wigenhorn*, 3 Id., 117. *Wells, Fargo & Co. v. Preston*, 3 Id., 444. *Horbach v. Miller*, 4 Id., 43. *Singleton v. Boyle*, Id., 414. *Horacek v. Keebler*, 5 Id., 356. *Hosford v. Stone*, 6 Id., 381. *Stanton County v. Canfield*, 10 Id., 390. *Russell v. The State, ex rel. Armor*, 13 Id., 68.

It will be observed that in the case at bar the cause was submitted on the first hearing upon just such a record as the plaintiff in error saw proper to present. The cause was decided, and I think rightly, and the judgment of the lower court affirmed. Now, years afterward, when plaintiff in error and his counsel, who is the same as on the first hearing, have had time to fully decide what they desire, and have presented the question upon which they want the court to pass, but, as in every stage of the case, make no complaint as to the verdict, I think, in view of uniform holdings in this state, the case should be disposed of upon the questions presented and no others. I furthermore view with some solicitude this step in the direction of opening up old judgments, and especially upon questions which are not presented for decision by the record. If this custom were to prevail there is no telling where the end would be, for very many of the records of conviction are as imperfect as the one in this case.

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4. Failure of order to state claim of plaintiff, so as to show whether or not the defendant is entitled to maximum of exemption against the same, not fatal. *Id.*..... 167
5. Motion to discharge decided by trial court on affidavits which are conflicting; supreme court will not reverse unless preponderance of evidence against the order is clear and decisive. *Meyer & Schurmann v. Zingre*..... 458
6. A cause of action in a petition upon a debt not fraudulently contracted, if coupled with a cause of action upon a debt which was fraudulently contracted, and an order of attachment covering both counts is issued upon an affidavit alleging that "said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought," *Held*, To vitiate such order of attachment and justify its discharge. *Id.*..... 458
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Constitutional Law.

1. The certificate of the presiding officer of a branch of the legislature that a bill has duly passed the house over which he presides is merely *prima facie* evidence of that fact, and evidence may be received to ascertain whether or not the bill actually passed. *State v. McClelland*..... 236
2. The journals of the respective houses are records of the proceedings therein, and if it should appear from them that a bill had not actually passed, the presumption in favor of the certificate would be overthrown and the act declared invalid. *Id.*..... 236
3. Act of 1885, Comp. Stat., Ch. 5, sec. 8, increasing number of judges in second district is constitutional. *State v. Stevenson*..... 416
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10. "Slocumb Liquor Law," *Held*, Constitutional. *Mette v. McGuckin*..... 323
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- Conveyance.** See MORTGAGE, 1.
1. A deed or mortgage of real estate executed by a party out of possession, and having no record, title, or apparent interest in the premises, is not alone, when recorded, constructive notice of the title or interest of such grantee or mortgagee against one who traces his title from the apparent owner. *Traphagen v. Irwin*..... 195
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- Corrupting Witness.** *Chrisman v. State* 107
- Costs.**
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5. Payment of taxes in unorganized counties. *Fremont, etc., E. B. Co. v. Brown County* 516
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1. Has jurisdiction to revive dormant judgment. *Hunter v. Leahy & Co.*..... 80
2. May assign widow's dower; and in order to oust it of such jurisdiction the right of the applicant to such dower must be disputed by presenting an issue of fact, which, if established by proof, would defeat her claim of dower, and such issue must be one which the county court by its organization is unable to try. *Guthman v. Guthman* 98
3. May assign homestead on settlement of estate. *Id.*..... 98
4. Judgment made lien on real estate by filing transcript in office of clerk district court. *Id.*..... 562

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1. Increase of number of judges of district court. *State v. Stevenson*..... 416

Court—Supreme.

1. Pleading not amendable in supreme court on original motion. *Spellman v. Frank* 110
2. But where an action is brought upon a contract instead of a *quantum meruit*, and all the proof introduced without objection, showing the right of the plaintiff to recover, the supreme court will, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause

- to the district court for such amendment. *Homan v. Steele, Johnson & Co.*..... 652
3. If evidence on each side is of nearly equal weight, and the only objection to the finding and judgment is that they are against the weight of evidence, they will not be set aside. *Doolittle v. Wheeler* 136
4. Leave given plaintiff to require the defendant to marshal securities and exhaust those upon which the plaintiff has no lien, before resorting to the latter. *Traphagen v. Irwin*, 196

Creditor's Bill.

1. Judgment debtor removed to another county, and after removal execution issued and returned unsatisfied, *Held*, That creditor's bill would lie, without issuance of execution to county where defendant resided at the time, if bill allege that debtor has no property subject to execution. *Sayre v. Thompson* 33
2. Creditor's bill to subject a judgment to payment of creditor's judgment; *Held*, Under the facts stated that the owner of the judgment is estopped to set up and claim as a defense that the plaintiff in creditor's bill obtained satisfaction of their claim by attachment of goods of debtor. *Id.*..... 33
3. Attorney's lien not affected by creditor's bill against judgment which they obtained. *Id.*..... 34

Criminal Law.

1. Verdict of lower degree of homicide on first trial set aside, accused may be convicted of higher grade on second trial. *Bohanan v. State*..... 57
2. Opinion of juror founded on newspaper reports does not disqualify. *Id.*..... 57
3. In a trial for murder a verdict of guilty which does not ascertain whether it be murder or manslaughter, as required by section 489 of the Criminal Code, confers no power on the court to pass sentence on the accused. *Par-rish v. State* 405
4. Prosecution by information; construction of statute; proceedings exclusive. *Jones v. State*..... 401
5. When jury is impanelled state must proceed with prosecution. *State v. Shuchardt*..... 455
6. Failure of jury to agree on verdict; duty of judge; discharge of jury; record must show necessity for discharge. *State v. Shuchardt*..... 454
7. Corrupting witness; evidence. *Chrisman v. State* 107
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1. How considered in arriving at worth of services of real estate agent. *Lansing v. Johnson*..... 175

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1. By stock; facts stated, and owner, *Held*, Not liable for damages done, and that there was no question of negligence to submit to jury. *Holmes v. Irwin*..... 313
2. Instruction to jury to "assess to plaintiff such damages as from all the evidence you shall find he has sustained by reason of illegal taking and detention of personal property," *Held*, Vague and misleading. *Morehead v. Adams*, 570
3. For detention of property in replevin cases. *Romberg v. Hughes* 579
4. In action for breach of executory contract to deliver personal property. *Post v. Garrou*..... 687
5. Rule in cases of amercement. *Crooker v. Melick*..... 227
6. Injuries to person. *City of Lincoln v. Walker* 244
7. Rule of, where buildings are not erected according to contract. *Morrissey v. Schindler*..... 681
8. Where in an action for damages resulting from personal injuries a physician, being a son of plaintiff, was permitted to testify, over the objection of defendant, to the opinions expressed by consulting physicians who were called to examine plaintiff as to the results of the injury, it was *Held*, To be error, the testimony being incompetent and hearsay. *Village of Ponca v. Crawford*..... 551
9. Verdict in favor of plaintiff not set aside at his instance because not large enough, where cause of injury is matter of conjecture. *Benzon v. B. & M. R. R. Co*..... 559
10. Amount recoverable under Ch. 21, Comp. Stat., is question for jury. *Johnson v. M. P. R. R. Co*..... 690

Death.

1. Presumption from absence; presumption of, from circumstances. *Cox v. Ellsworth* 664

Demurrer.

1. To answer which constitutes a defense should be overruled. *Mansfield v. Avery* 478
- B. & M. R. R. Co. v. Young Bear*.... 492

Dismissal of Action.

1. As to one defendant during trial. *Morrissey v Schindler*.. 672

Discretion of Court.

1. The order of introducing evidence is discretionary with the trial court. *Village of Ponca v. Crawford*..... 551
2. In discharging jury in criminal case who fail to agree. *State v. Shuchardt* 456

Divorce and Alimony.

1. Wife, upon decree, entitled to dower; if she do not demand it, and trial court awards sum in gross in nature of permanent alimony, claim for dower will be barred. *Tatro v. Tatro*..... 395
2. Decree for permanent alimony bars further claim of wife against estate of husband. *Id.*..... 396
3. Conveyance by husband to defeat decree of alimony; burden of proof on grantee to show valuable consideration. *Atkins v. Atkins* 474

Dower. See HUSBAND AND WIFE.

1. May be assigned by county court. *Guthman v. Guthman*, 98

Ejectment.

1. Where answer of defendant put in issue title of plaintiff, but alleged no equitable defense, a finding and judgment for the plaintiff upheld, notwithstanding there was evidence which, under proper allegations, would have tended to establish an equitable defense. *Uppfalt v. Nelson*..... 533

Embezzlement.

1. Mere refusal of a treasurer to pay an order, warrant, or draft on him by proper officers does not constitute. *Chaplin v. Lee* 440
2. To constitute embezzlement it is essential that the owner should be deprived of the property alleged to be embezzled by an adverse use or holding. *Id.*..... 440

Equity.

1. Decree set aside for mistake, etc., and defense allowed to be made. *Buchanan v. Griggs*..... 121

Error Without Prejudice.

1. A judgment will not be reversed nor a verdict set aside for an error which has been committed without prejudice to the party complaining. *Village of Ponca v. Crawford*... 551
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Estoppel.

1. Garnishee estopped in case stated from attacking regularity of proceedings. *B. & M. R. R. Co. v. Chicago Lumber Co.*..... 303

Evidence.

1. Preponderance only sufficient, but where jury are instructed that if a claim is established by a "fair" preponderance of the evidence, the use of the word "fair" is not prejudicial. *Dunbar v. Briggs* 97
2. Conflicting as to damages must be submitted to jury. *R. V. R. R. Co. v. Fink & Wykoff* 89
3. The rule of evidence which precludes the proof of the con-

- tents of written instruments or records by parol testimony does not preclude oral testimony of the existence of such instruments or records preliminary to their introduction or proof of their loss or destruction. *Village of Ponca v. Crawford* 551
4. Hearsay inadmissible. *Id.* 551
 5. Legislative journals; certificate of presiding officer. *State v. McClelland* 238
 6. Plaintiff dismissed suit against one of the defendants during trial, *Held*, That contract stated was properly admitted in evidence after such dismissal. *Morrissey v. Schindler* 672
 7. To vary contract by parol. *Id.* 673
 8. Of work and labor. *Id.* 673
 9. In criminal charge of libel. *Mills v. State* 575
 10. Privileged communications between attorney and client. *Romberg v. Hughes* 579
 11. Location of corner of government land. *Morrison v. Neff* 135
 12. In cases of amercement. *Crooker v. Melick* 227
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Exceptions. See BILL OF EXCEPTIONS.

Executions.

1. Against garnishee. *B. & M. R. R. Co. v. Chicago Lumber Co.* 303

Exemption.

1. Homestead exempt from debts prior to patent; exemption continues in favor of grantee, and he may plead same. *Baldwin v. Boyd* 444

False Imprisonment.

1. Plaintiff must prove criminal prosecution to have been without probable cause and malicious by preponderance of evidence; but where want of probable cause is clearly shown, and all the facts and circumstances of the case are before jury, they may find from the facts showing a want of probable cause that prosecution was malicious. *Casebeer v. Rice* 203
2. When proof of real facts may be shown for purpose of showing want of probable cause and malice. *Id.* 204

Final Order.

1. An order awarding alimony *pendente lite* is not. *Aspinwall v. Aspinwall* 463
2. Order of county superintendent creating, changing, and dividing district is a final order subject to review. *State v. Palmer* 648

Foreign Judgment.

1. *Held*, Not to have full force and effect. *Tessier v. Englehart & Co.*..... 167

Forfeiture.

1. Of money advanced on contract. *Post v. Garrow*..... 683

Fraud.

1. The representation of a fact in the future, and not a mere promise which has been acted upon and turns out to be false, will entitle the injured party to the same remedies as fraudulent misrepresentations of an existing fact. *Abbott v. Abbott*..... 503
2. Mere sale to relative of stock of goods is not of itself a badge of fraud. Such a sale made in good faith upon sufficient consideration, and not to hinder or defraud creditors, will be sustained. *Lining v. Herron*..... 450
3. Where a bill of sale of a stock of goods was made to the mother and brother of the debtor to pay debts owing by him to them, *Held*, That as against other creditors the grantees acquired only the right to have a sufficient amount of the goods sold to satisfy their claims, and the balance was a trust fund for the benefit of other creditors, and the grantees must account. *Id.*..... 450
4. Conveyance while suit is pending; burden of proof. *Atkins v. Atkins*..... 474
5. Promise in case stated, *Held*, Not within statute of frauds. *De Witt v. Root*..... 567

Garnishment.

1. After judgment, under sec. 249, Code; order of court that garnishee pay amount due enforced by execution. *B. & M. R. R. Co. v. Chicago Lumber Co.*..... 303
2. Garnishee in case stated, *Held*, Estopped to question regularity of proceedings. *Id.*..... 303
3. Garnishee, *Held*, Not liable on facts stated. *Code v. Carlton*..... 328

Grand Jury.

1. Not to be summoned unless judge direct. *Jones v. State*, 401

Guardian and Ward.

1. Liability of guardian for negligence in care of ward. *Nelson v. Johansen*..... 180

Guardian Ad Litem.

1. Failure to appoint, where real estate is sold by administrator, not fatal. *McClay v. Foxworthy*..... 295

Herd Law.

1. Taker up acquires no lien unless he comply with law. *Deirks v. Wielage*..... 176

2. Owner may replevy stock if taker up refuses to appoint his arbitrator. *Id.*..... 176

Homestead.

1. May be assigned by county court on settlement of estate. *Guthman v. Guthman*..... 98
2. Tenant in common not entitled to right as against cotenant for value of his interest. *Lynch v. Lynch*..... 586

Homicide.

1. Where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial. *Bohanan v. State*..... 57

Housebreaking.

1. Evidence. *Seling v. State*..... 548

Husband and Wife.

1. Conveyance by aged husband to wife in trust for his support and that of the family not set aside because of disagreement and separation of parties. And if wife convey to other parties, upon their separation, equity will require an accounting, and make such decree as will protect interests of both the husband and wife. *Austin v. Austin*... 306, 309
2. Where land was conveyed by husband and wife by warranty deed to trustees appointed by the will of her father, for the "sole and separate use and benefit" of the wife, etc., the consideration being derived from the father's estate, a provision in the deed that the husband "shall have the right to occupy, farm, and control said lands for her (the wife)" does not create any estate in him, where there is no fraud. *Pemberton v. Pollard*..... 435
3. Where husband conveys real estate while wife is a non-resident, she has no dower interest therein. *Atkins v. Atkins*..... 474
4. Conveyance by husband to defeat alimony. *Id.*..... 474
5. Liability of husband for libelous letter written by wife. *Mills v. State*..... 575

Indictment. See INFORMATION.

1. Corrupting witness. *Chrisman v. State*..... 107

Infant.

1. Contracts of an infant, other than for necessities, are voidable only, and upon coming of age he may affirm or avoid in his discretion. *Philpot v. Sandwich Manuf'g Co.* 54
2. If an infant purchase personal property and give his promissory note therefor, he cannot, upon arriving at the

age of twenty-one years, retain the property and plead infancy as a defense to the note. *Id.*..... 54

Information.

1. Construction of statute allowing prosecution to be by information. *Jones v. State*..... 401

Injunction.

1. Liens to permit destruction of osage hedge fence by a stranger to the inheritance. *Sapp v. Roberts*..... 299
2. Does not lie to enjoin foreclosure sale on ground that court had no authority to amend the decree. *Gregory v. Tingley*. 320
3. Does not lie to restrain payment to contractor for erection of public bridge, after work is completed, and contractor has incurred liabilities. *Brown v. Merrick County*. 356

Injuries to Person.

- City of Lincoln v. Gillilan*..... 115
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Insane.

1. Appointment of matron of Hospital lies in governor. *In re Board of Public Lands and Buildings*..... 340
2. Tax for support (Comp. Stat., Ch. 40) not unconstitutional. *State v. Douglas County*..... 601
- Liability of county. *Id.*..... 601

Instructions to Jury. See COMMISSIONERS.

1. Where objection is made that the instructions of the court to the jury are not sufficiently explicit, the remedy is to request instructions which are satisfactory. *R. V. R. R. Co. v. Fink* 89
2. Party dissatisfied with instructions, on ground that they do not comprehend the whole case or go far enough, must present instruction embracing the law as he understands it. *Post v. Garrow*..... 688
3. Not error to refuse to repeat; not error to refuse to re-instruct on same proposition, but with the addition of a clause limiting the force of the instruction when such limitation would be against the interest of the party asking the instruction; or, if error, it would be error without prejudice. *City of Lincoln v. Gillilan*..... 114
4. Should be confined to issues. *Id.*..... 114
5. When upon a jury trial an instruction is asked by which it is sought to cover the whole case made by the party asking it, all the essential elements of the case should be embodied in the instruction, otherwise it is not error to refuse it. *Nelson v. Johansen*..... 180

6. Must be applicable to testimony; restricted to actual questions at issue. *U. P. R. R. v. Ogilvy*..... 639
7. Examined and *Held*, Not indefinite. *Gibson v. Sullivan*.. 560
8. Right to require written instructions waived if no exception taken at time oral charge is given. *Gibson v. Sullivan* 558

Insurance.

1. Contract defined; on facts stated, *Held*, That defendant was a mutual insurance company, and as such must comply with statute before transacting business. *State v. Farmers Benevolent Association*..... 276
2. Not necessary for plaintiff in action on policy to allege or prove title to property insured. *Western Ins. Co. v. Scheidle*..... 495
3. Waiver of payment of premium. *Id.*..... 495
4. Authority of general agent to employ sub-agent; evidence conflicting on question of employment must be submitted to jury. *Equitable Life v. Brobst*..... 526

Interest.

1. A party receiving funds deposited in court, to which he is entitled, is not chargeable with interest thereon. *Cresman v. Whitall*..... 508

Intervention.

- Attorneys in action of tort cannot intervene and assert attorneys' lien. *Abbott v. Abbott*..... 505

Jail.

1. No bonds for, can be issued by county. *State v. Lincoln County*..... 283

Jeopardy.

1. Prisoner in jeopardy when jury has been sworn. *State v. Shuchardt*..... 455

Judgment.

1. The judgment of a foreign court against a person domiciled in this state, where it appears by the record that no personal service of process was had upon such defendant, and that he made no appearance to the action, will not have full force and effect in this state. *Tessier v. Englehart & Co.*..... 167
2. Not a lien upon equitable interest in real estate of debtor. *Nessler v. Neher*..... 649
3. Lien of judgment of justice of peace of another county; how perfected. *Pemberton v. Pollard*..... 435
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